

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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.

MATTHEW SCOTT SKYBERG,

Defendant and Appellant.

E060840

(Super.Ct.No. SWF1202966)

OPINION

APPEAL from the Superior Court of Riverside County. Albert J. Wojcik, Judge.

Affirmed.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Matthew Scott Skyberg guilty of attempted voluntary manslaughter (Pen. Code, §§ 664/192, subd. (a)),<sup>1</sup> as a lesser included offense of the charged crime of attempted premeditated murder (§§ 664/187, subd. (a)). The jury also found true that in the commission of the crime, defendant had personally inflicted great bodily injury upon the victim (§ 12022.7, subd. (a)) and that defendant had personally used a knife (§ 12022, subd. (b)(1)). Defendant was sentenced to nine years six months in state prison as follows: the upper term of five years six months for the substantive offense, plus a consecutive three years for the great bodily injury enhancement, plus a consecutive term of one year for the knife use enhancement. Defendant's sole contention on appeal is that the trial court erred in imposing an aggravated term for his attempted voluntary manslaughter conviction based on dual use of factors implicit in the two enhancement allegations. We reject this contention and affirm the judgment.

## I

### FACTUAL BACKGROUND

On July 23, 2012, Shawn Snyder threw a party for his family and a group of friends in his Lake Elsinore home. The party began around noon and continued into the evening as guests enjoyed food, drinks (including alcoholic beverages) and music. Defendant, who was a newcomer to the group of friends, arrived at the party later in the evening.

---

<sup>1</sup> All future statutory references are to the Penal Code unless otherwise stated.

At some point in the evening, defendant got into a loud and hostile argument with one of the guests, Matthew Graham. Graham was still recovering from having suffered very serious injuries after he was hit by a semi-truck and was using a colostomy bag and catheter and could barely walk. When John Berry, another party guest, heard defendant threaten Graham, Berry told defendant not to speak to Graham that way and also explained Graham's health situation. Defendant then started arguing with Berry and told Berry that he would "fuck him up, too." During the argument, defendant also told Berry, "I am going to fucking stab you, I'm crazy and I'm from Elsinore." The two yelled at and shoved each other before another guest separated them. The confrontation ended with defendant and Berry shaking hands with each other; Berry believed that they had "settled [their] differences."

Later, defendant told Snyder that he was getting upset again and that he was going to go home. However, defendant did not leave the party, but instead walked to his truck, retrieved a knife, and then returned. After he watched defendant walk away, Berry went outside to urinate in the bushes.

Berry then noticed defendant walking up from behind him. Fearing that defendant was going to hit him, Berry turned around and tried to push defendant away. Berry was unaware of what exactly occurred next, but felt like defendant had "knocked the air out of" him. Berry fell to the ground, unable to breathe. As Berry stood up and struggled to walk into the house, defendant angrily yelled to the party guests that they "might want to

go check [their] homie and take him to the hospital” because he had just stabbed him. Defendant then jumped into his truck and sped off.

Snyder heard his female cousin scream, ran towards her, and saw Berry walking towards the garage, clutching the front of his body. Snyder asked Berry what had happened, but Berry could not speak. As Snyder walked Berry to the bathroom, he saw that Berry was bleeding. Once Berry looked down and realized that he was bleeding, he fell to the ground.

When paramedics arrived on the scene, Berry’s heart had stopped beating and he had to be “shocked” back to life. He was transported by ambulance to a local hospital and then airlifted to Loma Linda hospital with life-threatening injuries. Berry suffered three stab wounds (one near his collarbone, one to his chest, and one to his abdomen), internal bleeding in his heart, had a chest tube placed, and had a heart attack. During surgery, doctors found lacerations to the heart itself and to the right coronary artery. Berry spent five days in intensive care and a month in a hospital. Berry was 19 at the time of the incident, and the attack left him with little to no function in half of his heart. Following his release, Berry had to have a pacemaker surgically implanted in his body.

Berry denied possessing or reaching for a knife or other weapon at the time he was stabbed. He also denied picking up a bike lock or threatening defendant at anytime during that evening.

Defendant testified on his own behalf. He stated that he, Berry, and Graham had gotten into several verbal arguments throughout the night of the party. After one of the

arguments, Berry swung at defendant and he had to duck to avoid being hit. A short time later, defendant believed that he saw Berry reach behind the barbeque grill and grab a steak knife. At that moment, defendant also “perceived” a group begin to surround him, and when he started to flee, he saw Berry advancing towards him with “his arm cocked back.” Defendant claimed that he feared Berry was going to stab him so he stabbed Berry in self-defense. Defendant admitted that he had fled the scene after stabbing Berry, but turned himself in two days later.

## II

### DISCUSSION

Defendant contends, based on what is commonly called the “dual use” prohibition contained in section 1170, subdivision (b), and California Rules of Court, rule 4.420,<sup>2</sup> that the trial court erred in imposing the upper term on the attempted voluntary manslaughter conviction based on factors implicit in the great bodily injury and weapon use enhancements. He, therefore, claims the matter must be remanded for a new sentencing hearing. The People respond defendant forfeited this claim; and, in the alternative, argue the trial court cited proper reasons for imposing the upper term for the voluntary manslaughter conviction.

At the sentencing hearing, after the trial court noted that it had read the probation report, the court heard a victim impact statement from Berry’s mother, as well as argument from the prosecutor and defense counsel. The prosecutor argued the upper

---

<sup>2</sup> All rule references are to the California Rules of Court.

term should be imposed based on defendant's actions, defendant's attempts to minimize his actions, defendant's past criminal history, and defendant being a danger to society. Defense counsel requested the court impose the lower term, noting that the circumstances in aggravation presented by the probation officer were in error. Defense counsel argued that based on the jury's verdict, defendant had actually believed, although unreasonably, that he was in danger of great bodily injury or death; and that counsel did not believe defendant's prior convictions were numerous or of increasing seriousness. The probation officer recommended the middle term.

The trial court denied probation and imposed the upper term of five years six months for the substantive offense, a consecutive three years for the great bodily injury enhancement, and a consecutive term of one year for the knife use enhancement. In imposing the sentence, the court listed factors in denying probation, muddled with aggravating factors to support the upper term. In relevant part, the court stated: "Okay. According to probation, defendant suffered a felony conviction, I guess a felony adjudication when he was a juvenile for making criminal threats back in 2001; in October of 2004, driving a stolen vehicle, possession of stolen vehicle; other felony conviction in 2004; 2007 we have a spousal battery; 2008, violating protective order; 2011, vandalism. [¶] Okay. The defendant apparently has the ability to comply with conditions of probation. [¶] The likely effects of imprisonment of the defendant are considered serious. [¶] . . . [¶] When we talk about attempted voluntary manslaughter, sometimes there are injuries. But in this particular case, the violence of the act and the resulting

consequences are extremely serious, more so than a majority of attempt voluntary manslaughter type charges. He did use a deadly weapon. He did inflict great bodily injury upon the victim. [¶] His performance on probation previously was not satisfactory. [¶] It is likely, if released, defendant would, in fact be a danger to society. [¶] The crime did include great violence, great bodily harm. His acts disclose an extremely high degree of cruelty, viciousness, callousness. We have the weapon that was used. [¶] . . . What he did resulted in a life altering situation for the victim. . . . But at this point, this is very serious. It's not getting hit with a baseball bat which is very serious and that's it and one hopes to recover from that. It is reasonable to assume under these circumstances that the crime did involve great violence, great bodily injury. The defendant was armed with a knife at the time of the incident. Defendant has, in fact, engaged in violent conduct and—so considering the gravity, serious injuries sustained, the significance of the crime that was committed, probation is denied. [¶] Okay. The attempted voluntary manslaughter, the lesser to count 1, the court will impose the upper term of five years six months state prison.” The court then imposed the terms for the great bodily injury and weapon use enhancements and awarded defendant 695 days for time served.

Defendant contends the trial court erred in imposing the upper term on the voluntary manslaughter conviction because it relied solely on factors implicit in the two enhancements and therefore it was a dual use of facts. In support, defendant claims the court “did not specifically give any reasons for imposing the upper term; instead the

court's comments prior to the imposition of sentence were directed only towards the denial of probation.”<sup>3</sup> We disagree.

“[T]he court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed . . . .” (§ 1170, subd. (b).) “To comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so.” (Rule 4.420(c); see *People v. Scott* (1994) 9 Cal.4th 331, 350 (*Scott*).

As a threshold matter, we agree with the People's argument that this issue has been forfeited because defendant raised no objection on this basis in the trial court. “[T]he waiver doctrine should apply 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 double-counted a particular sentencing factor*, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons.” (*Scott, supra*, 9 Cal.4th at p. 353, italics added.) In articulating the reason behind the rule, the Supreme Court stated: “Although the court is required to impose sentence in a lawful manner, counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. Routine defects

---

<sup>3</sup> We believe the court's comments were intended to be both reasons for denying probation and imposing the upper term.

in the court's statement of reasons are easily prevented and corrected if called to the court's attention. As in other waiver cases, we hope to reduce the number of errors committed in the first instance and preserve the judicial resources otherwise used to correct them." (*Ibid.*; see *People v. De Soto* (1997) 54 Cal.App.4th 1, 7-8 [applying *Scott* forfeiture rule to claim of improper dual use of facts to impose an upper term sentence].)

The *Scott* court further noted, however, that the forfeiture rule applies only if there was a "meaningful opportunity to object" to the trial court's statements. (*Scott, supra*, 9 Cal.4th at p. 356.) "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." (*Ibid.*; accord, *People v. Gonzalez* (2003) 31 Cal.4th 745, 755.)

Defendant contends that he did not have a meaningful opportunity to object because "[t]here was absolutely no statement of reasons given for the imposition of the upper term and absolutely no meaningful opportunity for [defendant] to object to the dual use." Contrary to his assertion, he had an opportunity to object to the trial court's aggravating factors because they were all cited in the probation report, the court gave the parties an opportunity to present argument at the sentencing hearing, and prior to adjourning the hearing the court invited comment from the parties. In any event, his contentions of error fail on the merit.

Rules 4.421 and 4.423 list the possible circumstances in aggravation and mitigation. Any fact that is an element of the crime or the basis for a sentence enhancement cannot be used to justify imposition of the upper term. (§ 1170, subd. (b); rule 4.420(c) & (d).) The court must state its reasons for imposing the upper term (rule 4.420(e)), and those reasons must be supported by substantial evidence on appeal (*People v. Searle* (1989) 213 Cal.App.3d 1091, 1096). “ ‘Improper dual use of the same fact for imposition of both an upper term and a consecutive term or other enhancement does not necessitate resentencing if “[i]t is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error.” ’ ” (*People v. Osband* (1996) 13 Cal.4th 622, 728.) “[T]he finding of even one factor in aggravation is sufficient to justify the upper term.” (*People v. Steele* (2000) 83 Cal.App.4th 212, 226; see *People v. Osband, supra*, 13 Cal.4th at pp. 728-729.)

The trial court’s sentencing decision is reviewed for an abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) “ ‘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.’ [Citation.]” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

Here, even if the trial court inappropriately relied on the factors of the weapon use and great bodily injury, based on dual use limitations, the court also relied on other circumstances in aggravation listed in rule 4.421 to support its reasoning in imposing the upper term. The court relied on evidence that defendant had engaged in violent conduct indicating a serious danger to society (rule 4.421(b)(1)); defendant's prior convictions as an adult or juvenile were numerous or of increasing seriousness (rule 4.421(b)(2)); that defendant's prior performance on probation was unsatisfactory (rule 4.421(b)(5)); and that defendant had displayed an extremely "high degree of cruelty, viciousness, [and] callousness" (rule 4.421(a)(1)). These facts were an ample basis for imposing the upper term and are supported by substantial evidence.

Rule 4.421(a)(1) states: "The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness." With respect to this factor, the trial court emphasized it was primarily concerned with the "extremely high degree of cruelty, viciousness, [and] callousness" of the crime. To support the court's determination that the current crime was highly cruel, vicious, and callous and involved violent, dangerous conduct, the record must support a finding of "circumstance[s] . . . that make[] the offense 'distinctively worse than the ordinary.'" (*People v. Black* (2007) 41 Cal.4th 799, 817, overruled on other grounds as stated in *Cunningham v. California* (2007) 549 U.S. 270; see *People v. Webber* (1991) 228 Cal.App.3d 1146, 1169-1170.) The aggravating circumstances must be "above and beyond the essential constituents of [the] crime which increases its guilt or enormity or

adds to its injurious consequences.” (*People v. Davenport* (1985) 41 Cal.3d 247, 289, superseded by statute on another ground as stated in *People v. Crittenden* (1994) 9 Cal.4th 83, 140, fn. 14; see *People v. Garcia* (1995) 32 Cal.App.4th 1756, 1776 [Fourth Dist., Div. Two] [aggravating factor must exceed minimum requirements necessary to establish the crime].)

The facts of the offense bear this out. After starting a fight with a disabled man, defendant then started a fight with the victim who had come to the disabled man’s aid and sought to stop the argument. Defendant eventually calmed down but continued to argue with the victim and stated he was going to leave the party. However, instead of leaving the party, defendant retrieved a knife from his truck and attacked the victim, stabbing the victim three times in his heart, abdomen, and collarbone. Defendant claimed he had attacked the victim in self-defense, which the jury believed, but defendant stabbed the victim three times in vital parts of his body and fled the scene. These facts can reasonably support an inference that defendant committed the offense with callousness, viciousness, and cruelty that was beyond that necessary to establish attempted voluntary manslaughter with knife use and great bodily injury. Further, the court could reasonably conclude that defendant’s conduct in repeatedly threatening the disabled man and the victim and then repeatedly stabbing the victim showed violent, dangerous conduct that surpassed the minimal level of conduct implicit in attempted voluntary manslaughter with knife use and great bodily injury.

Defendant's actions go beyond mere use of the knife or infliction of great bodily injury: rather, it was a gratuitous act of extreme violence exhibiting unusual cruelty, viciousness, and callousness. Under these circumstances, the trial court did not violate the dual use prohibition by basing the upper term for the attempted voluntary manslaughter in part on the viciousness or callousness of the crime, while at the same time imposing weapon use and great bodily injury enhancements. (*People v. Collins* (1981) 123 Cal.App.3d 535, 538-539 [court imposed aggravated term for kidnapping based on viciousness and callousness of crime as well as an enhancement for gun use—no dual use where appellant held cocked gun to his victim's head over period of several hours during stand-off with police]; cf. *People v. Harvey* (1984) 163 Cal.App.3d 90, 116-117, [viciousness and callousness as aggravating factor in imposing upper term of nine years was proper where victim was attacked under circumstances where he had no opportunity to defend himself, there was no provocation of any sort, and where victim was shot without any explanation, because such qualities are not inherent to the charged offense of attempted murder by use of a firearm].) The trial court properly relied on defendant's criminal history, his prior performance on probation, his viciousness, callousness, and cruelty, as well as other factors the court described as “[w]hat [defendant] did resulted in a life altering situation for the victim.” (Rule 4.421(b)(1), (2), (5), (a)(1) & (c).)

The cases cited by defendant where courts applied the dual use prohibition to the use of a weapon are inapposite because none involved use of a firearm or weapon in such a way that the court found the crime to be unusually vicious or callous. (*People v. Roberson* (1978) 81 Cal.App.3d 890, 893-894 [where the defendant was convicted of robbery of a restaurant, court must decide whether armed allegation is to be used “to aggravate or to enhance, one or the other, but not both as was done here”], overruled on other grounds as stated in *People v. Crowson* (1983) 33 Cal.3d 623, 632, fn.10; *People v. Smith* (1980) 101 Cal.App.3d 964, 967 [trial court improperly used fact of the defendant’s firearm use both to impose the upper term for robbery and as a basis for a firearm enhancement].)

In sum, the trial court could properly rely on four of the six aggravating factors in support of the upper term. The only erroneous factors were the great bodily injury and weapon use. Notably, the trial court found no mitigating factors. Given the lack of mitigating factors and the court’s focus on the high level of cruelty, callousness, and violence in the current crime as well as its consideration of defendant’s prior convictions and performance on probation, it is not reasonably probable the court would have made a different sentencing choice absent the error. (*People v. Osband, supra*, 13 Cal.4th at p. 728.) The trial court therefore did not abuse its discretion in imposing the upper term on the attempted voluntary manslaughter conviction. (*People v. Sandoval, supra*, 41 Cal.4th at p. 847.)

III  
DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ  
P. J.

We concur:

MILLER  
J.

CODRINGTON  
J.