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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.

RUBEN MARTINEZ,

Defendant and Appellant.

E061212

(Super.Ct.No. FCH05935)

OPINION

APPEAL from the Superior Court of San Bernardino County. Gregory S. Tavill, Judge. Affirmed.

Jan B. Norman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Sabrina Y. Lane-Erwin, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Ruben Martinez guilty of voluntary manslaughter. (Pen. Code, § 192, subd. (a).)¹ It also found that defendant personally used a deadly or dangerous weapon in the commission of the offense. (Former § 12022, subd. (b)(1).) A trial court found that he had served one prior prison term. (§ 667.5, subd. (b).) The court sentenced defendant to the upper term of 11 years, plus one year on the weapon use enhancement and one year on the prison prior, for a total term of 13 years in state prison.

On appeal, defendant contends the court abused its discretion in imposing the upper term. We affirm.

FACTUAL BACKGROUND²

On July 20, 2003, defendant and the victim got involved in a verbal argument, which escalated into a physical altercation, after the victim kicked defendant's girlfriend out of the house. Defendant stabbed the victim in the stomach and then fled the residence. His whereabouts were unknown for a period of 10 years. On February 22, 2013, defendant was found using an alias in Florida. He was taken into custody and extradited to California under an arrest warrant. After being read his *Miranda*³ rights,

¹ All further statutory references will be to the Penal Code, unless otherwise noted.

² Because this appeal concerns a sentencing issue, we will only give a brief summary of the facts relevant to defendant's conviction. This factual background was taken from the probation report.

³ *Miranda v. Arizona* (1966) 384 U.S. 486.

defendant said that, on the day of the offense, the victim rushed him and began hitting him.

ANALYSIS

The Trial Court Properly Imposed the Upper Term

Defendant argues the court abused its discretion when it imposed the upper term because it relied on improper and inaccurate factors. He contends that the court relied upon the fact that he used a knife, which the court also used to impose an enhancement. He also claims that the court relied on the fact that he “was the father of his girlfriend’s child,” which it allegedly found relevant because she was 14 or 15 years old at the time she became pregnant. We conclude that the court properly sentenced defendant to the upper term.

A. Standard of Review

“Sentencing courts have wide discretion in weighing aggravating and mitigating factors [citations], and may balance them against each other in ‘qualitative as well as quantitative terms’ [citation] We must affirm unless there is a clear showing the sentence choice was arbitrary or irrational.” (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582.)

B. Relevant Background

At the sentencing hearing, the court stated the following: “In terms of the factors affecting the sentencing, the Court has three choices to make: I have weighed the factors in mitigation and the factors in aggravation. The Court cannot ignore the defendant’s prior history, which is serious. The circumstances of this case, in terms of how he was

the father of [his girlfriend's] child, those circumstances are the repeat of the behavior that's set forth in his criminal history. [¶] Obviously a knife was used. It's unclear as to who brought the knife to the incident but I think a fair interpretation of the evidence is that [defendant] brought the knife to the incident. I think it's clear that [defendant] did not take responsibility for this incident . . . for a long time after it happened." The court then sentenced defendant to the aggravated term of 11 years.

C. Defendant Forfeited His Claim by Failing to Object

Citing our Supreme Court's decision in *People v. Scott* (1994) 9 Cal.4th 331, the People argue that we should not consider defendant's arguments because he forfeited them by failing to object on these grounds at the time of sentencing. We agree. In *Scott*, our Supreme Court held that a defendant must object at the time of sentencing to the trial court's failure to properly make or articulate sentencing choices. (*Id.* at p. 353.) Defendant did not object at the sentencing hearing when the trial court sentenced him to the upper term. Because he did not object, he has forfeited the claim on appeal. (*Id.* at p. 356.) Defendant asserts that his counsel argued below for the imposition of the midterm sentence. Nonetheless, defense counsel did not *object* to the court's imposition of the upper term or the reasons for its choice. (*Id.* at p. 353.) In the alternative, defendant claims that he received ineffective assistance of counsel when his counsel failed to object. To prevail on this claim, defendant must demonstrate that his counsel's performance was objectively unreasonable and that, but for counsel's errors, the result of the proceeding would have been different. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216.)

Defendant's claim fails because, even if defense counsel had objected, the result of the proceeding would not have been different. (See *post*, § D.)

D. The Court Properly Sentenced Defendant

The court here stated numerous reasons for imposing the upper term on defendant's voluntary manslaughter conviction. It first noted defendant's criminal history, which it considered serious. The record shows that defendant had a 1990 misdemeanor conviction for falsely representing himself to a peace officer (Pen. Code, § 148.9), a 1995 juvenile disposition for committing lewd or lascivious acts involving a child under the age of 14 years (Pen. Code, § 288, subd. (a)), a 1998 felony conviction for rape of a minor who was more than three years younger than the defendant (Pen. Code, § 261.5, subd. (c)), and a 1999 conviction for failing to provide proof of car insurance (Veh. Code, § 16028, subd. (a)). Defendant's criminal history was a proper consideration for the court. (Cal. Rules of Court, rule 4.421(b)(2) [defendant's prior convictions as an adult or juvenile are numerous or of increasing seriousness].) The court also noted that defendant did not take responsibility for the incident "for a long time after it happened." The record shows that defendant fled the scene, absconded to Florida, and lived under an alias. His whereabouts were unknown for 10 years. The fact that defendant did not take responsibility for his actions for 10 years was also a proper consideration for the court. (See Cal. Rules of Court, rule 4.420(b) [in selecting the term, the court may consider all the relevant facts presented at the sentencing hearing] and rule 4.408 [aside from the enumerated factors, the court may consider "additional criteria reasonably related to the decision being made"].) The court additionally mentioned that defendant was the father

of his girlfriend's child, and that he brought and used a knife to commit the crime. Furthermore, the court stated that it weighed the factors in mitigation and aggravation. We note that the probation report listed only one mitigation factor—"[t]he victim was an initiator of the incident." In view of its imposition of the upper term, the court clearly found that the factors in aggravation outweighed the factor in mitigation.

Defendant argues that the court improperly made dual use of the facts that he used a knife in the commission of the offense and that he was previously convicted of statutory rape. (§ 261.5.) Section 1170 instructs on the use of mitigating and aggravating sentences. Subdivision (b) of section 1170 provides that "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." Defendant claims that the court could not rely on his use of a knife as an aggravating factor, since it imposed a one-year enhancement for personal weapon use. (Former § 12022, subd. (b)(1).) He similarly claims that since the court imposed a one-year enhancement on the prison prior, and the underlying conviction was his 1998 statutory rape conviction, the court could not consider such statutory rape conviction as an aggravating factor. The record shows the court did refer to the fact that a knife was used in the current incident. It also referenced defendant's status as a father, which it said was a "repeat of the behavior that's set forth in his criminal history." This comment was an apparent reference to defendant's two prior sex offenses involving minor victims. It is not clear why the court made this reference or the reference to the knife. In any case, even if error occurred, "a court needs only one factor to impose the aggravated term." (*People v. Kelley* (1997) 52 Cal.App.4th 568, 581; see *People v.*

Osband (1996) 13 Cal.4th 622, 730.) The court here listed not only one, but two factors that adequately supported the imposition of the aggravated term—defendant’s serious criminal history and his failure to take responsibility for his conduct for 10 years. (See *ante*.) We further note that the court heard and considered defense counsel’s argument regarding mitigating circumstances. In view of the aggravating factors, we cannot say that the court’s decision to impose the upper term was arbitrary or irrational.

DISPOSITION

The judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

KING
J.

CODRINGTON
J.