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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

KARLA ALVAREZ,

Defendant and Appellant.

F063600

(Super. Ct. No. F09906770)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Wayne R. Ellison, Judge.

Jennifer A. Mannix, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Cornell, J. and Poochigian, J.

Karla Alvarez injured Maria Bravo in a brawl at a restaurant. A jury convicted her of assault with a deadly weapon that caused great bodily injury. (Pen. Code, §§ 245, subd. (a)(1), 12022.7, subd. (a).) The court denied probation and imposed the mitigated two-year prison term plus three years for the great bodily injury enhancement. Despite her presumptive ineligibility for probation, Alvarez appeals contending the court abused its discretion when it refused to find hers was an unusual case that merited probation. We affirm.

FACTS

On November 16, 2009, the victim, Maria Bravo, was at Toledo's restaurant in Fresno with friends. She and her friends were taking photos of each other with sombreros the restaurant provided. Alvarez approached and took a sombrero from Bravo's head. Bravo told her to wait until they were finished. Alvarez and Bravo's group argued until Alvarez threw the sombrero towards the door and walked away with friends. Bravo headed to the restroom. As she passed Alvarez, Bravo told her they were finished with the sombrero. Alvarez hit Bravo in the face and the women began fighting. Others also fought until security guards broke up the fights.

One security guard escorted Alvarez to the banquet room and left her there alone. Another placed Bravo's arms behind her back and walked her toward the exit door. Alvarez came out of the banquet room, grabbed a bottle and hit Bravo on the head, breaking the bottle. Alvarez then ran the broken bottle down the side of Bravo's face. Someone put a towel to Bravo's face, which was bleeding badly. Bravo walked outside to an ambulance holding a cloth to her bleeding face. She did not argue or fight with anyone in the parking lot. She and another woman identified Alvarez, who was in the parking lot, as her attacker to an investigating officer. Alvarez charged at and began striking the woman who had pointed her out to the officer. That woman fought back and both women fell to the asphalt. An officer, who separated the two, opined that Alvarez was intoxicated. Alvarez had lacerations, swelling and red marks on her head and arms.

Bravo was taken to the hospital where her wound was sutured and she was treated overnight. She has a scar from her injuries. Bravo has a civil lawsuit pending regarding the attack and the restaurant's handling of the incident.

Defense

Gerardo Hernandez, who worked as a security guard at the restaurant, was called to assist with the fight near the restrooms. He saw another security guard separating Bravo and appellant. Four other women were "trying to continue fighting with [appellant]." As Hernandez was walking away with Bravo, a man punched him. Meanwhile, another woman struck Bravo with a glass object, slashed her cheek, and left. Alvarez was in the banquet room at the time. Shortly after, Hernandez saw Bravo outside being "verbally abusive" with the woman who had hit her with the bottle. He saw Alvarez defending herself from others but did not see her attack anyone. He tried to give a statement to the investigating officer but she walked away. He did not tell the officer that another person--not Alvarez, who had been arrested--was the person who had hit Bravo and was leaving the scene.

Sentencing

At sentencing, defense counsel filed a memorandum that urged the court to find this was an unusual case under California Rules of Court, rule 4.413 (b) (rule 4.413) and probation was appropriate under California Rules of Court, rule 4.414 (rule 4.414). Alvarez was a single mother raising a five-year-old daughter without significant contributions from the father; she had no criminal record; she had been a positive influence on others; she had attended General Educational Development (GED) classes while in jail and, although she was dropped for being late, she had reapplied; and, while out on bail, she had been employed. In addition, she had committed the crime under circumstances of great provocation that were unlikely to reoccur; she had no history of violence; the crime occurred while she was drinking; she would adhere to any treatment the court ordered; she had a well developed support system to help her meet probation

conditions and imprisonment was likely to affect her and her daughter. Letters submitted on Alvarez's behalf from herself, her family, friends and five-year-old daughter urged leniency in sentencing.

The probation officer recommended that probation be denied and Alvarez be sentenced to the two-year mitigated term enhanced by three years for the great bodily injury findings.

The court noted that this was a very serious matter in that Alvarez had cut Bravo, a virtual stranger to her, leaving her with a facial scar for life. While Alvarez maintained she did not do it, the jury found otherwise. Further, state law presumed she should go to prison, except in unusual cases where the interests of justice would best be served if probation were granted. The only unusual circumstance the court perceived was Alvarez's young age (21 at the time of the offense and 23 at sentencing) and no prior criminal history. However, the court noted, that was not an interest of justice matter, just unusual. The court concluded:

“All of the rest of the circumstances do not suggest that probation is appropriate. [T]his was a fight about a sombrero And while you may have had something to drink, it wasn't enough to drink to justify this kind of behavior, by all accounts. So under the circumstances, ... I'm sorry to tell you, and I recognize the consequences to [your daughter]. Somebody in your family had written about that fact, that [your daughter] will be punished by this as much as you, and I suspect there is truth in that, but under the circumstances, I'm denying probation.”

The court found the factor in mitigation--no criminal history--outweighed any in aggravation and imposed the low prison term. The court also imposed the three year enhancement for the jury's great bodily injury finding, which the court agreed with in light of the permanent injury to Bravo's face.

DISCUSSION

Alvarez contends she is not the typical offender to come before the court. She was a 21-year-old single mother who was drunk at the time of the offense. During the two-year pendency of the case, she was out on bail, was employed as a waitress, and had no contacts with law enforcement. She attended all court hearings and, while in jail awaiting sentencing, she was a model inmate and attended GED classes. The probation report and sentencing memorandum note that Alvarez was “laid off” from her job as a waitress before trial and she was dropped from the GED class for being late but had reapplied for admission. They do not mention her behavior in jail.

The People respond that the court did not abuse its discretion in sentencing as it did. We conclude there was no abuse of discretion.

Standard of Review

Penal Code section 1203, subdivision (e) provides that except in unusual cases where the interests of justice demand departure from the declared policy of imprisonment, probation shall not be granted to any person who used a deadly weapon or willfully inflicted great bodily injury in the perpetration of the crime of which they were convicted.

In determining whether the statutory limitation on probation has been overcome, the court is required to use the criteria set forth in rule 4.413. If the court finds the case to be an unusual one, it must then decide whether to grant probation, utilizing the statutory criteria set forth in rule 4.414. (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 830.) We review the trial court’s finding that a case is not unusual for abuse of discretion. (*Id.* at p. 831.)

Alvarez claims the trial court abused its discretion in four regards: (1) the court cited inappropriate factors to support its denial of probation; (2) it failed to adequately assess the factors required to determine Alvarez’s eligibility for probation; (3) additional factors supported a finding of unusual circumstances; and (4) additional criteria

supported a finding that Alvarez should be placed on probation. We consider each in turn.

1. Inappropriate Factors Cited

Alvarez submits the trial court erred when it denied probation because it found the jury had convicted her of a serious offense, assault with a deadly weapon causing great bodily injury, which carried a presumptive prison sentence. She contends, under *People v. McNiece* (1986) 181 Cal.App.3d 1048, the court erred when it relied on the degree and serious nature of the victim's injuries or the vulnerability of the victim to deny probation when both are inherent aspects of the underlying offense rather than factors that make this offense especially contemptible. (*Id.* at pp. 1058-1059.) The People assert Alvarez forfeited the issue by failing to raise it in the trial court. (*People v. Scott* (1994) 9 Cal.4th 331, 353 [waiver doctrine applies to claims the trial court's stated reasons allegedly do not apply to the case].) Alvarez responds that because she thoroughly discussed the reasons why the court should grant probation in her sentencing memorandum, a further objection would have been futile. (*People v. Hill* (1998) 17 Cal.4th 800, 821.)

Alvarez forfeited review of this contention. While we disagree that the court cited inappropriate factors, to the extent that Alvarez perceived that it did, she was required to object to the perceived error in the trial court. Her failure to do so forfeits the issue on appeal.

2. Inadequate Assessment of Factors to Determine Probation Eligibility

Alvarez submits the court failed to properly assess the factors under rules 4.413 and 4.414. Specifically, the court "failed to acknowledge" that Alvarez committed the offense after great provocation, she was drunk at the time, and had engaged in a mutual fight with the victim. The court also failed to address her familial and community support, her future potential and her role as the sole supporter of her daughter.

Under rule 4.413, facts that may indicate an unusual case include: (1) the circumstance giving rise to the limitation on probation is 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; (2) the defendant participated in the crime under circumstances of great provocation, coercion, or duress not amounting to a defense; (3) 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 (4) the defendant is youthful and has no significant record of prior criminal offenses.

Courts must construe “unusual case” and “interests of justice” narrowly so that the statutory limitations on probation have substantial scope and effect. (*People v. Superior Court (Dorsey)* (1996) 50 Cal.App.4th 1216, 1229.) Thus, unusual cases are limited to those matters in which the crime is either atypical or the offender’s moral blameworthiness is reduced. (*Ibid.*)

Alvarez was doubly presumptively ineligible for probation because she used a deadly weapon and inflicted great bodily injury in assaulting the victim. Under rule 4.413, the court could find hers was an unusual case under two sets of criteria: (1) if the court found her use of a deadly weapon and infliction of great bodily injury was substantially less serious than circumstances in other assaults with a deadly weapon that cause great bodily injury; and (2) if the court found she acted out of provocation or duress, if the crime resulted from a mental condition that could be successfully treated, or if she was young with no prior record. Here, the trial court found that Alvarez’s offense was not substantially less serious: she had seriously cut a young woman--a virtual stranger--causing a permanent scar on the victim’s face.¹ And while the trial court found she was young with no prior record, it rejected the provocation and mental condition

¹ The probation officer’s report stated the victim received deep lacerations to her face that required surgery. She was left with a four-to-five-inch scar on the left side of her face.

factors noting that this was a fight about a sombrero and Alvarez's drinking was not enough to justify "this kind of behavior."

Alvarez addressed the relevant factors in her sentencing memorandum. And, the trial court read the sentencing memorandum, the probation report, and the letters that had been submitted on Alvarez's behalf. We presume the court considered all relevant criteria unless the record affirmatively shows otherwise. (Cal. Rules of Court, rule 4.409; *People v. Weaver* (2007) 149 Cal.App.4th 1301, 1318.) As such, there is no support in the record or under the law to conclude the trial court failed to "properly assess" or "acknowledge" the relevant factors under rule 4.413. Rather, it rejected Alvarez's arguments that the facts of her case met those factors and justified an unusual case finding. Alvarez has not shown an abuse of discretion.

3. Additional Factors Showing an Unusual Case

Alvarez contends, based on the totality of circumstances, the trial court should have granted her request for probation. She asserts additional aspects of her case limited her culpability. She was intoxicated and her offense occurred after "she had been beaten" by Bravo and Bravo's friends. As such, she acted under duress and great provocation. She also asserts she apologized for her actions, told the court she was willing to comply with any probation conditions, and had lead a responsible, law-abiding life during the approximately 22 months the case was pending.

Alvarez submits her case is similar to *People v. Superior Court (Du)*, *supra*, 5 Cal.App.4th 822, the case in which the owner of a crime plagued liquor store shot and killed an unarmed teenager. The teenager put a bottle of orange juice in her backpack and Mrs. Du concluded she was trying to steal it. The two struggled and Du grabbed a gun she had never used before and shot the victim. The gun, which her husband had purchased for self-protection, had a hairpin trigger. (*Id.* at pp. 826-827, 834.) The jury convicted Du of voluntary manslaughter and personal use of a firearm. Du's use of a gun made her presumptively ineligible for probation. However, the trial court determined this

was an unusual case and the appellate court affirmed. The gun was used by a shopkeeper, who possessed it for lawful purposes, making this case sufficiently distinct from the circumstances typically present in other gun use cases. In addition, Du acted under circumstances of great provocation and duress. (*Id.* at pp. 832-833.)

Alvarez argues her case is similar because her offense arose out of an unusual set of facts and was completely out of character, her assault was no more egregious than other assaults with deadly weapons where great bodily injury results, and like Du, she had never before acted violently or engaged in criminal conduct. Also like Du, her offense involved a mutual fight and she too was injured.

Alvarez's argument relies on evidence and inferences the jury and the trial judge rejected. The prosecution's evidence showed that Alvarez initiated the altercation over use of the restaurant's sombrero. More telling, Alvarez broke the bottle over Bravo's head while Bravo was being escorted by a security guard with her hands behind her back. Further, after Alvarez assaulted Bravo with the bottle, she raked its broken end down Bravo's face inflicting the great bodily injury that resulted in lasting facial scars. While this may have been Alvarez's first criminal offense, it nevertheless constituted an egregious assault that resulted in a particularly unfortunate injury. Further, Alvarez told the probation officer she was "buzzed" but not intoxicated, and Alvarez continued to fight with others in the parking lot after she assaulted Bravo. Finally, while Alvarez expressed regret for Bravo's injuries, she denied responsibility for them. In short, neither *Du* nor Alvarez's additional factors demonstrate the trial court abused its discretion in not accepting her arguments that hers was an unusual case.

To the extent Alvarez claims the court should have considered that she has lead a responsible, law-abiding life during the approximately 22 months the case was pending and is viewed as a positive influence by friends and family in determining whether her case was unusual, she is mistaken. While these factors would be properly considered if Alvarez were eligible for probation, mere suitability for probation does not overcome the

presumptive bar set out in Penal Code section 1203. (*People v. Superior Court (Dorsey)*, *supra*, 50 Cal.App.4th at p. 1229.) A previous course of good conduct and good standing in the community is not reasonably related to the decision of whether an offense constitutes an “unusual case where the interests of justice would be best served” by granting probation. (*Ibid.*)

4. Additional Criteria Supporting Probation

Finally, Alvarez argues the court’s decision to deny probation was contrary to the spirit of the law and rule 4.414. The argument assumes the court abused its discretion in not finding that hers was an unusual case. Because the court properly found this was not an “unusual case,” the argument that additional factors supported a grant of probation is moot.

DISPOSITION

The judgment is affirmed.