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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JIMMY GOMEZ,

Defendant and Appellant.

G046164

(Super. Ct. No. 10CF1981)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Carla Singer, Judge. Affirmed.

Mark Yanis, 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, Assistant Attorney General, Alana R. Butler and James D. Dutton, Deputy Attorneys General, for Plaintiff and Respondent.

Jimmy Gomez appeals from a judgment after a jury convicted him of second degree robbery and one count of attempted second degree robbery, and found true he was armed with a firearm and personally used a firearm. Gomez argues the trial court violated the dual use of facts prohibition in sentencing him to the upper term. We disagree and affirm the judgment.

FACTS

Daniel Bahena and John Martin arrived at a party in Bahena's Chevrolet Tahoe (the Tahoe). They were there to meet Martin's girlfriend, Aurora Ramos. Gomez asked Martin to move the Tahoe from where it was parked, and Gomez and Ramos got into an altercation. Ramos got into the backseat of the Tahoe with Martin, while Bahena sat in the front passenger seat.

Alejandro Lopez approached Bahena and asked him for marijuana. After Bahena told Lopez he did not have any, Lopez entered the Tahoe and searched through the victim's belongings. Gomez approached Martin and Ramos, pulled out a gun, and demanded money and property. Gomez pointed the gun at Ramos and Martin. Unsuccessful, Gomez demanded money from Bahena, who put \$80 on the center console. Gomez took the money and the keys from the ignition. Lopez took speakers and protein powder from the back of the Tahoe. Gomez told them to leave, but they could not because they did not have the keys. After an argument about the keys, Gomez returned them, and they left. Ramos called the police the next morning.

Ramos later identified Gomez as the gunman and Lopez as his confederate. Martin and Bahena identified Gomez as the person whose facial features were similar to the person who had the gun.

Detective Rene Bonilla interviewed Gomez who eventually admitted he was at the party and took the money, but he claimed he gave the money to Lopez. Gomez claimed he was armed with a screwdriver, and not a gun.

An amended information charged Gomez with two counts of second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c))¹ (counts 1 & 2), and one count of attempted second degree robbery (§§ 664, subd. (a), 211, 212.5, subd. (c)) (count 3). As to all the counts, the information alleged Gomez personally used a firearm (§ 12022, subd. (a)(1)).²

At trial, Gomez testified on his own behalf. Gomez claimed Ramos and Martin were engaged in sexual activities in the back of the Tahoe and he brandished a screwdriver to get them to leave. Gomez asserted Lopez demanded the money and took the property, and he was essentially an innocent bystander to the robberies. He denied having a gun. He lied to police because he was scared.

The jury convicted Gomez of all counts and found true the enhancements. The probation report stated there were no mitigating circumstances but listed six aggravating circumstances: (1) Gomez pointed a handgun at the victims placing them at risk of great bodily injury and threatened to shoot Ramos; (2) Gomez was armed; (3) the victims were unarmed and thus vulnerable; (4) Gomez has engaged in past violent conduct, which indicates he is a danger to the community; (5) Gomez has a pattern of increasingly serious criminal conduct as he has three sustained juvenile petitions; and (6) Gomez was on juvenile probation when he committed the offenses.

At the sentencing hearing, the trial court explained it had read and considered the probation report and the sentencing briefs, and noted the prosecutor was not seeking the maximum sentence of 23 years and four months. In imposing the upper term on count 1, the trial court explained: “[Gomez] pointed a handgun at the victim, placing them at great risk for bodily harm. [Gomez] threatened to shoot the victim while the gun was pointed at her head. And [Gomez] has engaged in violent conduct in the

¹ All further statutory references are to the Penal Code.

² The amended information also charged Lopez with offenses and enhancements.

past, which is indicative of a danger to the community. [¶] As a juvenile he had three sustained petition for threatening a school employee, vandalism, . . . burglary, [and] petty theft. And, therefore, his record shows a pattern of increasingly serious criminal conduct which makes him a serious threat to the community. [¶] Moreover, [Gomez] was on probation, juvenile probation, when the crime in this case was committed.”

The trial court selected count 1 as the principal term and sentenced Gomez to the upper term of five years and a consecutive term of 10 years on the accompanying firearm enhancement. The court sentenced Gomez to concurrent terms on counts 2 and 3.

DISCUSSION

Gomez argues the trial court erred in using the same fact, use of a firearm, in imposing the upper term of five years on count 1 and imposing a consecutive term of 10 years on the firearm enhancement. Recognizing the Attorney General would argue forfeiture because defense counsel did not object, Gomez also contends his defense counsel provided ineffective assistance of counsel.

As expected, the Attorney General argues Gomez forfeited appellate review of the issue and in any event it has no merit because the court also relied on other factors in imposing the upper term and it is not reasonably probable the court would have sentenced Gomez differently had it not relied on a firearm related aggravating circumstance. We agree with the Attorney General that Gomez forfeited appellate review of the issue (*People v. Gonzalez* (2003) 31 Cal.4th 745, 755 [alleged dual use violation forfeited by failure to object in trial court]), but we will address the merits of his claim because he also argues defense counsel provided ineffective assistance of counsel by failing to object (*People v. Williams* (1998) 61 Cal.App.4th 649, 657 [addressing merits of claim despite forfeiture because defendant asserted ineffective assistance of counsel]).

When the trial judge at sentencing is required to select among the three terms statutorily authorized for the current conviction, a single factor in aggravation is an adequate basis for deciding to impose the upper term. (*People v. Black* (2007) 41 Cal.4th

799, 815.) However, the dual use of facts proscription bars the court from using the same fact as the sole factor in aggravation on which the upper term is based when that fact is the basis for any enhancement on which sentence is also imposed. (*People v. McFearson* (2008) 168 Cal.App.4th 388, 392-395.) A trial court violates the dual use prohibition by imposing prison time on a firearm use enhancement and using the fact of the firearm use as a reason for imposing the upper term. (*People v. Young* (1983) 146 Cal.App.3d 729, 734.)

Here, in imposing the upper term on count 1, the trial court did rely on the fact Gomez used a gun in the commission of the robbery. But that was not the only fact the court relied on. The court also relied on three other factors in imposing the upper term.

California Rules of Court, rule 4.421 (rule 4.421) provides a list of aggravating circumstances. Rule 4.421(b), specifies numerous aggravating circumstances specific to a defendant, including as relevant here, rule 4.421(b)(1), “The defendant has engaged in violent conduct that indicates a serious danger to society;” rule 4.421(b)(2), “The defendant’s . . . sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness;” and rule 4.421(b)(4), “The defendant was on probation . . . when the crime was committed[.]”

Here, the trial court relied on these three aggravating circumstances in imposing the upper term on count 1. The court explained Gomez had engaged in violent conduct that indicated he was a danger to the community. The court noted he had suffered three sustained juvenile petitions that demonstrated a pattern of increasing seriousness. Finally, the court stated that when Gomez committed these offenses, he was on juvenile probation. As one aggravating factor justifies the trial court imposing the upper term, these three aggravating factors certainly support the court’s imposition of the upper term of five years on count 1. Thus, there is no reasonable probability the trial court would have sentenced Gomez differently as there were other aggravating

circumstances the court could properly rely on in imposing the upper term. The court noted the maximum term was over 23 years, and the court struck a balance between the seriousness of the crime and its belief Gomez could still be rehabilitated. Based on the entire record before us, we conclude the trial court's imposition of the upper term on count 1 did not violate the dual use prohibition.

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

ARONSON, J.

THOMPSON, J.