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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.

LUIS ANTHONY CARMONA,

Defendant and Appellant.

G047808

(Super. Ct. No. 11CF2055)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven D. Bromberg, Judge. Affirmed.

Patrick Morgan Ford, 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, A. Natasha Cortina and Kristen Kinnaird Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Luis Anthony Carmona was convicted of robbery, conspiracy and recklessly evading the police. He contends there is insufficient evidence to support his conspiracy conviction, and the trial erred in sentencing him to the upper term on the robbery count. Finding these contentions unmeritorious, we affirm the judgment.

FACTS

Around three o'clock one morning, 67-year-old Martin Capune was riding his bicycle on Balboa Boulevard in Newport Beach. Because that stretch of road does not have a bike lane, Capune was riding as close to the curb as possible. Without warning, his bike was bumped from behind by a champagne-colored sedan. The impact did not cause Capune to fall off his bike, but he stopped to check for damage, noticing his rear wheel was slightly bent. He also noticed the sedan had continued east on Balboa for about half a block, made a U-turn and stopped across the street on the westbound shoulder. After idling there for a few moments, the vehicle proceeded forward, made another U-turn and pulled alongside Capune, who was still looking over his bike.

There were three people in the sedan. Appellant was the driver, codefendant Lorenzo Vizcarra was in the front passenger seat and codefendant Michelle Hernandez was in the back. As soon as they pulled up to Capune, Vizcarra yelled something to the effect of, "Hey, old man, give us five dollars." Capune surmised the people in the car were on some sort of scavenger hunt, and in an attempt to diffuse the situation, reached for his wallet to give them five dollars. Before he was able to tender the money, Hernandez said, "Get all of his money." Then Vizcarra exited the car and punched Capune in the side of the head, knocking him out. Besides Vizcarra, Capune did not see anyone else get out of the car. However, in the moments before he was punched, he heard not one, but two car doors slam "almost at the same time."

When Capune came to, appellant's car was gone, and he was being attended to by the police and paramedics. Although he was still somewhat groggy, he was aware his wallet was missing. He was taken to the hospital, where he was treated for

facial abrasions and a contusion on the side of his head that required six stitches. When the police interviewed him there, he said he heard two male voices yelling at him prior to being hit, and he indicated more than one man assaulted him.

Ryan Croteau lived near the crime scene. After hearing an “impact noise,” he got out of bed to see what was going on. As he was walking out to his balcony, he heard yelling, like an exchange, and the sound of two car doors closing. Then he saw appellant’s car leave abruptly and went downstairs to see if Capune was okay.

Based on Croteau’s and Capune’s descriptions of appellant’s car, officers were able to locate the vehicle in the area. When they attempted to pull him over, he sped away and led officers on an extended high-speed chase. During the pursuit, appellant and his cohorts tossed Capune’s wallet out the window. When their vehicle was finally cornered in Fullerton, Vizcarra and Hernandez surrendered to police, but appellant fled on foot and did not turn himself in until the following day.

At trial, a gang expert testified that at the time of the robbery, Vizcarra and Hernandez were active members of the Baker Street gang, and appellant was an associate of that gang. The expert also opined the robbery benefited Baker Street.

Appellant, Vizcarra and Hernandez were charged with second degree robbery, conspiracy to commit robbery, and recklessly evading the police. It was also alleged that they acted for the benefit of a criminal street gang and that appellant and Vizcarra personally inflicted great bodily injury on Capune. In addition, appellant was charged with aggravated assault for driving his car into Capune’s bicycle, and Vizcarra and Hernandez were charged with street terrorism.

As to appellant, the court dismissed the gang allegation after the prosecution’s case-in-chief, and the jury found the great bodily injury allegation not true. Although the jury deadlocked on the assault charge, and it was later dismissed, the jury convicted appellant of the remaining charges. The jury convicted Vizcarra and Hernandez as charged and found all the enhancement allegations against them to be true.

I

Appellant argues there was insufficient evidence to support his conspiracy conviction. We disagree.

In assessing appellant's claim, we review the whole record to determine whether there is "substantial evidence to support the verdict – i.e., evidence that is reasonable, credible, and of solid value – such that a reasonable trier of fact could find [appellant] guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.]" (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.) Where the circumstances reasonably justify the jury's findings, it doesn't matter whether they might also reasonably be reconciled with a contrary finding; reversal is not required unless there is no hypothesis under which there is substantial evidence to support the verdict. (*Ibid.*)

A conspiracy is an agreement between two or more parties to commit a crime. (*People v. Johnson* (2013) 57 Cal.4th 250, 257.) The parties must have both the intent to agree and the intent to commit the target offense, and they must commit an act in furtherance of the conspiracy. (*Ibid.*) Appellant admits there is sufficient evidence he intended to rob Capune and acted in furtherance of that objective. Indeed, the evidence indicates that, after pulling up to Capune, appellant joined Vizcarra in unburdening Capune of his wallet. Although the jury rejected the allegation appellant personally inflicted great bodily injury on Capune, there is substantial evidence he exited his car and assisted Vizcarra during the robbery. Thus, the sole issue is whether appellant and his confederates agreed to commit that offense.

As our Supreme Court has explained, "Evidence is sufficient to prove a conspiracy to commit a crime "if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. [Citation.] The existence of a conspiracy may be inferred from the conduct, relationship, interests, and activities of the

alleged conspirators before and during the alleged conspiracy.’”’ (People v. Maciel (2013) 57 Cal.4th 482, 515-516.)

At trial, the prosecutor theorized appellant intentionally bumped Capune’s bike as part of a scheme to get him off his bike and render him more vulnerable. The prosecutor also surmised that, in turning around and waiting on the opposite side of the street, appellant and his companions were sizing up Capune and waiting for the best time to rob him. Appellant argued the bump was just an accident, he only turned around to see if Capune was alright, and the robbery was a spontaneous event that lacked any sort of planning or agreement.

Although the jury deadlocked on the assault count, it is still somewhat suspicious that appellant bumped Capune’s bicycle. After all, it was 3:00 a.m., traffic was light, and Capune was hugging the curb at the time of contact. And if appellant was really so concerned about Capune’s welfare following the bump, he would have stopped immediately and checked on him. Instead, he continued on and pulled over on the other side of the street. We don’t know what he and his companions talked about at that point, but as soon they drove back to Capune’s location, they immediately asked for his money and jumped him. At no point did they ask Capune if he was alright or offer him assistance; rather, they did just the opposite. The jury could have believed appellant’s version of the facts. Or, based on the totality of the circumstances, the jury could reasonably infer he and the others returned with the collaborative intent to rob Capune. They chose the latter, and there is no basis for rejecting that analysis. Therefore, we reject appellant’s challenge to the conspiracy count.

II

The trial court sentenced appellant to the upper term of five years for the robbery. It stayed his sentence for the conspiracy and imposed a concurrent eight-month term on the evading count. Appellant contends the court abused its discretion in imposing the upper five-year term, but that is clearly not the case.

The probation department prepared an extensive sentencing report for the court. It reveals appellant was convicted of battery and placed on probation in 2007 for attacking a man who was with appellant's former girlfriend at a football game. His probation was revoked and reinstated three separate times in connection with that case. In 2009, appellant was convicted of second degree burglary for stealing beer from a store. Again he was granted probation, and again he violated it on multiple occasions. In 2011, following his arrest in the instant case, appellant violated a restraining order by sending letters to his former girlfriend. And while he was in custody for these offenses, he was written up for six minor, and three major, disciplinary violations.

Given appellant's criminal history, his role in the robbery, and the violent nature of that crime, the probation officer felt it would be "a travesty of justice" to grant him probation. She recommended instead that he be sentenced to "maximum incarceration." The prosecutor also advocated in favor of the maximum sentence.

At the sentencing hearing, most of the debate centered on whether appellant should be given another chance on probation. In arguing in favor of that option, defense counsel represented that if appellant hadn't been charged with the gang allegations, which were eventually dismissed, he would have been willing to plead guilty early on in the case. Defense counsel also emphasized the fact the assault charge was ultimately dismissed and appellant voluntarily surrendered to the police the day after the robbery. Characterizing appellant's involvement in the crime as a lapse of judgment, defense counsel claimed appellant was trying to turn his life around and even hoped to join the military – an opportunity that would likely be foreclosed if he were sent to prison.

It was good lawyering, but the court was not persuaded. Describing the robbery as an "ugly crime," the court found it involved serious and violent behavior, and appellant played an active role in the crime. The court also found that, over the years, appellant has demonstrated a "complete and total disrespect for authority," as evidenced by his actions in fleeing the police after the robbery and flouting the terms of his

probation in his previous cases. In addition, the court found appellant has a “history of repetitive criminal conduct which [has] appeared to escalate” over the years.

Defense counsel tried mightily to discount these factors and implored the court to give appellant a “second chance,” but the court noted this was actually appellant’s “fourth or fifth” chance. And while the court surmised appellant was “probably a fairly nice guy,”¹ it was concerned about the fact he continues to associate with gang members and engage in criminal activity. For all these reasons, the court denied appellant’s request for probation.

The court then proceeded to sentence appellant to the upper term of five years on the robbery count. In explaining its rationale for that term, the court said it was incorporating the reasons it relied on in denying appellant’s request for probation. The court also believed the robbery involved planning and sophistication and reflected a high degree of viciousness and callousness. The court felt that appellant’s conduct represented a serious danger to society and that there were no mitigating circumstances present.

When, as here, the criminal statute under which the defendant is convicted specifies three possible terms, the decision to impose the upper, middle or lower term rests within the sound discretion of the trial court. (Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rule 4.420(a).)² In making this selection, “the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision.” (Rule 4.420(b).) It is up to the judge to decide how much weight should be given to the pertinent circumstances. (*People v. Brown* (1988) 46 Cal.3d 432, 470.) He or she may minimize or disregard circumstances in mitigation (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401) and impose the upper term based on but a single factor in aggravation (*People v. Osband* (1996) 13 Cal.4th 622, 730).

¹ A tribute to defense counsel, considering his client was charged with attacking a 67-year-old man.

² The punishment for second degree robbery is two, three or five years in prison. (Pen. Code, § 213, subd. (A)(2).) All further rule references are to the California Rules of Court.

On appeal, “[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Absent] 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.] Concomitantly, ‘[a] decision will not be reversed merely because reasonable people might disagree. “An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.” [Citations.]’ [Citation.]” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

As a preliminary matter, the Attorney General claims appellant forfeited his right to challenge his sentence by failing to object when the court gave him the upper term on the robbery count. However, in imposing that term, the court made clear it was essentially relying on the same aggravating factors it cited in denying appellant’s request for probation. Given that defense counsel vigorously challenged the applicability of those factors at that time, and the court found his arguments unavailing then, there was no need for counsel to reiterate them when appellant’s final sentence was announced. By that time, the battle was over and appellant was excused from further contesting his sentence. (See *People v. McKinnon* (2011) 52 Cal.4th 610, 654 [under futility exception to forfeiture rule, a party is not required to raise objections or points that have already been rejected by the trial court].)

On the merits, appellant argues he was not actively involved in the robbery, nor was it planned, sophisticated or particularly egregious. (See rules 4.421(a)(1), (8).) In so arguing, appellant reiterates his claim the robbery was a spontaneous event that was largely carried out by his cohorts. However, for the reasons explained in the preceding section, we disagree with this characterization of the crime. Not only could the jury reasonably find appellant conspired to rob Capune, the trial court, bound only by the preponderance-of-the-evidence standard (*People v. Scott* (1994) 9 Cal.4th 331, 349-350), could reasonably conclude appellant played a major role in the robbery by bumping into

Capune's bicycle, assisting in the violent taking, and driving the getaway car. Although appellant's group didn't get much money from Capune, they waylaid a man more than twice their age with such force he was rendered unconscious and required six stitches to the head. We agree with the trial court that the evidence shows appellant helped carry out an "ugly crime" that reflected a high degree of viciousness and callousness.

Appellant also faults the court for considering his criminal history as an aggravating factor. He argues his prior offenses really weren't that significant because they were all relatively minor misdemeanors. However, the problem is, that by committing felonies in the present case, appellant has, as the trial court put it, "graduated" to more serious criminal behavior. He also continued to break the law and violate prison rules after he was arrested in this case. The continuing and escalating nature of his offenses is a legitimate aggravating circumstance, as is the fact he was on probation when he committed the present offenses and has performed poorly on probation in the past. (Rules 4.421(b)(2), (4) & (5).)

These factors also played into the court's finding appellant has demonstrated a complete lack of respect for authority. Appellant contends the court based this finding solely on the fact he fled from police following the robbery, and since he was separately punished for doing that, it was improper for the court to consider this fact in sentencing. (See rule 4.420(d) [a "fact that is an element of the crime upon which punishment is being imposed may not be used to impose a greater term."].) However, in finding appellant lacked respect for the law, the court considered not only his flight from the police, but also his extensive history of violating the law and the terms of his probation. The court was also rightly concerned with appellant's continued association with gang members (Vizcarra and Hernandez). Although appellant was not a gang member himself, it was reasonable for the trial court to conclude that his prior punishments have been ineffective in terms of deterring him from criminal behavior and that a more serious punishment was warranted in this case.

Lastly, appellant contends the trial court “overlooked the primary mitigating factor that [he] was remorseful and turned himself in.” Appellant did turn himself in, but not before leading the police on an extremely dangerous high-speed chase from Newport Beach to Fullerton. And while he has admitted some culpability, the probation officer reported, “In discussing the offense, [appellant] appears to have minimized his level of involvement. He rationalized his reasons for fleeing the scene and stated he ran from police because he was scared. His post-offense actions appear to be indicative of a criminally sophisticated and violent offender regardless of gang ties.”

All told, appellant’s record and the circumstances surrounding the robbery lead us to conclude he was fairly sentenced. While appellant assails the trial court’s decision to impose the upper term as an abuse of discretion, the record shows the court carefully considered appellant’s case, gave his attorney ample time for argument, and based its decision on legitimate sentencing factors that enjoy substantial evidentiary support. We discern no reason for disturbing appellant’s sentence.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.