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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.

JUAN ANTONIO ARELLANO,

Defendant and Appellant.

G050217

(Super. Ct. No. 13CF3446)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Sheila F. Hanson, Judge. Affirmed.

Denise M. Rudasill, 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, Senior Assistant Attorney General, Charles C. Ragland and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1); count 1)¹, assault with force likely to cause great bodily injury (§ 245, subd. (a)(4); count 2), battery with serious bodily injury (§ 243, subd. (d); count 3), and making a criminal threat (§ 422; count 5).² The jury also found it to be true that defendant inflicted great bodily injury in the commission of counts 1 and 2. (§ 12022.7, subd. (a).) The court denied defendant's request for probation and sentenced him to six years in prison, consisting of the midterm of three years on count 1, plus a three year great bodily injury enhancement pursuant to section 12022.7, subdivision (a). Punishment on counts 2, 3, and 5 was stayed pursuant to section 654. The total prison term was six years.

Defendant's sole contention on appeal is that the court abused its discretion in denying his request for probation. We disagree. Defendant's entire argument turns on rejecting the testimony of the victim that defendant instigated the conflict, and accepting the testimony of defendant that the victim instigated it. It was within the court's discretion to weigh the credibility of this conflicting testimony. Accordingly, we affirm.

FACTS

The victim was 71 years old at the time of the incident. He testified as follows:

On October 29, 2013, defendant and his wife had been living with the victim for approximately four months. Defendant and the victim did not get along and the victim wanted defendant to move out. At some point, the victim heard defendant

¹ All statutory references are to the Penal Code.

² Count 4 was an alleged assault causing great bodily injury against a different victim, but was dismissed prior to submitting the case to the jury.

banging on, and ultimately breaking, his front door. The victim confronted defendant, and defendant explained that he had left his key in the house. Later on the victim heard his wife crying in another room. The victim went to investigate and found defendant's wife attacking his wife on the ground. Defendant arrived at about the same time and the victim told defendant to restrain his wife. Instead, defendant grabbed a bat and attacked the victim. The victim blacked out.

When the victim regained consciousness he was on the ground outside, had taken a blow to his head, and could not open his eyes. Defendant was on top of him punching him in the face. Victim's wife was next to him screaming for victim's daughter-in-law, named Leticia, to come out and help them. Defendant then grabbed the bat and began attacking the victim with the bat. Defendant said he was going to kill the victim. When the victim's daughter-in-law came out and confronted defendant, he ran away. Some time later the police arrived and the victim was driven to a hospital.

On cross-examination, defense counsel attempted to catch the victim in two inconsistencies. First, the victim had told the police defendant dragged him out of the house, yet he testified at trial he was unconscious. When confronted with the apparent inconsistency, the victim responded that he inferred the defendant dragged him outside: "Well I think so. Otherwise, who else?" Second, when confronted with an apparent inconsistency of testifying he was first struck in the house but telling the investigating officer he was struck outside the house, the victim testified, "Well, he hit me outside of the house also many times. That was the beginning." "Outside he hit me more." The victim also testified that at the hospital the police "ask[ed] me a few things, but I was unconscious because my head was not right."³

³ The victim was testifying through an interpreter. It is not clear whether the victim meant literally unconscious or just not in a right state of mind.

The victim's wife testified that defendant's wife initially struck her with a crutch, and that she lost consciousness until they were outside the house. She testified that when she regained consciousness her husband was next to her, his face bloodied.

A neighbor from across the street testified that at the time of the incident she was outside her house throwing away dirty water from mopping when she heard a female voice screaming the name "Leticia." She got closer and saw a man she recognized as a renter kneeling down and punching someone. She was unable to confidently identify defendant in court but said it "could be" him. After hearing the name "Leticia" screamed, she saw the renter pick up a bat and begin striking the person on the ground with the bat. When the neighbor saw the bat become bloodied, she grew frightened, rushed back into her home, and instructed her niece to call the police. When she and her niece came back outside, the renter was still striking the man on the ground with the bat. She testified that she thought the man with the bat was going to kill the person on the ground. The neighbor then saw Leticia come out and scream "What did you do, dog?" At that point the assailant left.

Police Officer Daniel Norman interviewed the victim and his wife after they were transported to the hospital. He testified about several photographs that are not in our record. As part of that testimony, he noted that the victim suffered a wound to the side of his head that required staples to close. Officer Norman also noted that defendant had several scratches on his cheeks.

Officer Norman testified that at the time of his interview at the hospital, the victim was unable to open his eyes as they were swollen shut. In the interview, unlike his testimony, the victim told Officer Norman that it was defendant who had assaulted his wife, rather than defendant's wife. Otherwise, the victim's interview statements generally matched his trial testimony. In the interview the victim recounted that defendant was pushing the bat down on his throat. He then heard defendant's wife say,

“Let him go. Come on. Let’s get out of here.” Defendant replied, “No, I’m going to let him die.”

Officer Norman also interviewed the victim’s wife at the hospital. She stated in the interview that she saw defendant pull the victim by his leg and drag him outside. She further stated that she left the house through the front door and saw the defendant on top of the victim. The victim was bleeding from the head and the defendant was pushing the bat down on the victim’s throat. The victim’s wife also stated that when defendant was leaving, he approached her, punched her in the head, and pushed her. She never mentioned to the officer that she was assaulted in the house by either defendant or his wife, or that she ever lost consciousness.

The defense called two witnesses, defendant and his wife.

Defendant’s wife testified that she and defendant were attempting to leave the house but the victim blocked their way. Defendant was pushing his wife’s empty wheelchair, and in attempting to get past the victim the wheelchair struck the wall and broke pieces of wood and paint. Defendant then had to walk by the victim’s wife, who began striking defendant in the head with a wooden spoon, seven or eight times. The victim then approached defendant carrying a bat and began to strike defendant with the bat. Defendant reacted in self-defense and began fighting with the victim, all the while the victim’s wife continued striking defendant with the wooden spoon. Defendant, the victim, and the victim’s wife all fell to the ground. Defendant’s wife was telling the victim to let go of the baseball bat, and when he did so, defendant got up and left with his wife. Defendant never had the baseball bat, only the victim did.

On cross-examination defendant’s wife acknowledged that defendant was on top of the victim and struck him approximately 15-20 times in the face with his fists. Defendant’s wife attributed the victim’s head wound to falling outside on the spigot for turning on the sprinklers.

Defendant testified on his own behalf and gave a similar account to that of his wife. He testified that as he was pulling his wife's wheelchair out of the house, the victim's wife began beating him with a spoon. His wife attempted to protect him from the victim's wife, but the victim came and pushed defendant's wife. When defendant saw the victim assault his wife, defendant attempted to hit the victim. Then the victim got the bat and began hitting defendant. On the third strike, defendant grabbed the bat and began punching the victim to get him to release the bat. Once the two made it outside, they fell to the ground, with the victim's wife continuing to strike defendant, and defendant continuing to strike the victim. Eventually defendant's wife managed to take the bat from the victim, and defendant stopped fighting. Defendant likewise testified that he never hit the victim with a bat.

As rebuttal, the People called Officer Norman back to the stand. He testified that he interviewed defendant after arresting him. In that interview, defendant stated that after he took the bat away from the victim, he got on top of the victim and punched him two times because he was angry. Defendant denied saying that to the officer. Otherwise, defendant's statement to Officer Norman was largely consistent with his trial testimony.

As noted above, the jury found defendant guilty on counts 1, 2, 3, and 5, and found great bodily injury allegations to be true as to counts 1 and 2. At the sentencing hearing, defense counsel requested that the court impose probation. The court denied the request. It found defendant was presumptively ineligible for probation pursuant to section 1203, subdivision (e)(3), because defendant inflicted great bodily injury on the victim. Analyzing the factors in California Rules of Court, rule 4.413,⁴ the court found no circumstances suggesting that the interests of justice support allowing probation, and in particular found defendant's crime was not committed as a result of

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All rule references are to the California Rules of Court.

great provocation: “I reject the defense invitation to find that this crime was committed under great provocation, coercion, or duress.” The court also found defendant had a history of violent misdemeanor crimes: “The defendant actually does have a record of committing crimes of violence, albeit in a misdemeanor offense.”

DISCUSSION

Defendant’s sole contention on appeal is that the court abused its discretion in denying his request for probation. We disagree.

There is no dispute in this case that defendant was presumptively ineligible for probation under section 1203, subdivision (e)(3), which provides, “Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any of the following persons:” “Any person who willfully inflicted great bodily injury or torture in the perpetration of the crime of which he or she has been convicted.” The standards for determining whether the case is an unusual one where the interests of justice would best be served by probation are set forth in rule 4.413. Defendant relies on rule 4.413(c)(2)(A) which provides, “The defendant participated in the crime under circumstances of great provocation, coercion, or duress not amounting to a defense, and the defendant has no recent record of committing crimes of violence.”

“The standard for reviewing a trial court’s finding that a case may or may not be unusual is abuse of discretion.” (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831.) “Our function is to determine whether the respondent court’s order is arbitrary or capricious, or “exceeds the bounds of reason, all of the circumstances being considered.” [Citation.] 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.” (*Ibid.*)

Defendant argues that he, “although presumptively ineligible for probation, overcame that presumption because [defendant] committed the crimes because of great provocation not amounting to a defense and he had no recent prior crimes of violence. [Citation.] This is true because, [defendant] and his wife testified that [the victim] and his wife started the altercation by hitting [defendant] with a wooden spoon and the baseball bat inside the house, when [defendant] was trying to take his wife’s wheelchair outside.” “[A]lthough the jury found [defendant] guilty of the assaultive crimes against [the victim], this does not mean that they rejected the evidence that demonstrated that [defendant] committed the crimes under great provocation not amounting to a defense. This is because [the victim and his wife] told a complete different story about how the altercation occurred, when they spoke to police, than they did at trial, rendering the credibility of their testimony to be extremely questionable.” “Based upon this credibility problem and [defendant’s and his wife’s testimony] that showed there was great provocation, the jury could have believed that [the victim and his wife] may have physically assaulted [defendant] inside the house, but still found [defendant] guilty based on [the victim’s] injuries and upon the testimony of the neighbor . . . who only witnessed the altercation once [defendant] and [the victim] were outside, because the jury could have determined that the force [defendant] used outside the house with the baseball bat was too excessive to be justified as self-defense, even if it believed [defendant] was assaulted inside the house.”

The fundamental problem with this argument is that, even if the jury could have viewed the evidence this way and reached the result it did, we are not reviewing the jury verdict. We are reviewing the court’s ruling denying probation. And the court specifically found defendant was not acting under great provocation. The evidence on this front was in conflict: It was a classic he-said/she-said regarding how the altercation

started. Weighing the credibility of that testimony was plainly within the realm of the trial court's discretion. Accordingly, we affirm.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.