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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JEREMY MURPHY,

Defendant and Appellant.

2d Crim. No. B285337
(Super. Ct. No. 17F-04774)
(San Luis Obispo County)

Jeremy Murphy appeals a judgment following conviction of assault by means likely to produce great bodily injury, elder abuse with infliction of injury, misdemeanor resisting and obstructing a police officer, and misdemeanor willful disobedience of a protective order. (Pen. Code, §§ 245, subd. (a)(4), 368, subd. (b)(1), 148, subd. (a)(1), 166, subd. (a)(4).)¹ We affirm.

FACTUAL AND PROCEDURAL HISTORY

This appeal concerns Murphy's assault of his disabled, wheelchair-bound father in the father's home in Nipomo. When

¹ All further statutory references are to the Penal Code unless otherwise stated.

police officers responded, Murphy attempted to obstruct their investigation and physically resisted arrest. Murphy now asserts evidentiary and sentencing errors regarding his trial.

Jerry Murphy, then 77 years old, lived with his son who had served as his caregiver for several years.² Jerry had used a wheelchair or motorized “scooter” for many years due to knee surgery complications and his longtime arthritis.

In October 2014, Jerry telephoned for police assistance because Murphy was “bullying” him. As a result, Murphy was arrested and jailed. Jerry later obtained a protective order against his son. At the present trial, Jerry described his son as “a closet drinker” and “a good boy” who “has his problems.”

On May 25, 2017, Murphy drove Jerry to the pharmacy and to a fast-food restaurant. During the drive home, Murphy struck Jerry several times. After Murphy parked the vehicle, he struck Jerry again and refused to allow him to leave the vehicle. Jerry managed to leave the vehicle, however, and enter his home on his scooter.

Inside the home, Murphy pulled Jerry from his recliner chair onto the floor. He then sat on Jerry, placed a medical-lift belt around Jerry’s neck and lifted Jerry’s body from the floor, choked Jerry with his hands, and kneed Jerry in the head, causing his head to strike a wooden sofa leg. Jerry lost consciousness twice during the assault.

Jerry crawled away from Murphy and used his telephone to call for police assistance. Murphy then pulled Jerry by his ankles across the floor, injuring Jerry’s hip. By then, Jerry was bleeding profusely from a cut across his eyebrow and left arm.

² We shall refer to Jerry Murphy as “Jerry” or “father” not from disrespect but to ease the reader’s task.

During the police emergency call, Jerry stated: “I’m getting my butt whooped. . . . I’m bleeding all over the place. . . . I’m getting it all over. . . . My head, my nose. . . . I’m disabled . . . not able to get up and – it’s nasty, believe me. . . . [I]t’s my grave time I need help. . . . Quit kicking me please. . . . [H]e’s been kicking . . . the shit out of me. He hung me – pulled me twice where I . . . lost consciousness. I got cuts all over my body. Uh, he’s kicking the shit out of me. . . . Knead me. He’s a fucking nut I can’t talk in front of him [because] . . . I get a big wallop to the head He kneed me in the jaw.” During Jerry’s recorded conversation with the police dispatcher, Murphy (in the background) stated, “You don’t need no help.” At trial, the prosecutor played the audiotape of Jerry’s emergency call.

San Luis Obispo County Sheriff’s Deputies Trevor Lopes and Barney Foster responded to the emergency call. The deputies wore police uniforms and arrived in a marked patrol vehicle. Murphy responded at the front door and blocked the deputies’ views of the interior of the home. Murphy had dried blood on his hands, feet, and clothing. He also appeared to be intoxicated – his speech was slurred, his posture unsteady, and he emanated an odor of alcohol. The deputies heard Jerry call for assistance from inside the home.

After Murphy refused to step aside to allow the deputies to enter, they pulled him outside. Following a struggle, they placed Murphy in handcuffs. Nevertheless, Murphy attempted to re-enter the home. The deputies ordered him to cease resisting and placed him on the ground.

Inside the home, Lopes found Jerry on the floor covered in blood. He had a wound to his eyebrow and skin torn from his left arm. Jerry refused hospital treatment and informed Lopes that “his son would have killed him that night.” Lopes took

photographs of Jerry's injuries and the interior of the home which were later presented into evidence at trial.

The deputies arrested Murphy, placed him inside the patrol vehicle, and drove to jail. During the trip, Murphy threatened the deputies with physical harm. An in-unit video camera captured Murphy's behavior and threats. At trial, the prosecutor played a redacted version of the videotape.

Following the incident, Jerry was less able to care for himself. For some time, he suffered bruises and hip pain, vomited and urinated blood, and experienced memory problems.

At trial, Jerry testified that he and Murphy were "playing" but the playfulness escalated into "a brawl." Jerry stated that Murphy's "love turned to hate then and he started getting rough." Jerry did not recall losing consciousness during the assault and stated that his hip has always hurt.

Prior to trial, Jerry advised the prosecutor's investigator that he did not want his son to be in trouble and therefore may not recall aspects of the assault. At trial, the court concluded that Jerry was "intentionally noncooperative," and permitted the prosecutor to question Jerry pursuant to *People v. Green* (1971) 3 Cal.3d 981 [where witness's lack of memory amounts to deliberate evasion, inconsistency with prior statements is implied], overruled on other grounds by *People v. Chavez* (1980) 26 Cal.3d 334, 357.

Murphy testified at trial that he was his father's caregiver and that he drove his father to a medical appointment, the pharmacy, and a fast-food restaurant the day of the incident. Murphy denied striking his father and stated that his father had slipped during an assisted transfer from the scooter to the sofa. Murphy explained that he attempted to lift his father with a lift-belt without success. He then used a sheet to pull his father into

the bedroom. Murphy denied grabbing his father's neck or hitting him with his knee. During cross-examination, Murphy admitted that he had a 2008 conviction for domestic battery against his wife, and a 2014 conviction for making criminal threats against his father.

The jury convicted Murphy of assault by means likely to produce great bodily injury (count 1), elder abuse with infliction of injury (count 2), misdemeanor resisting and obstructing a police officer (counts 3 and 4), and misdemeanor willful disobedience of a protective order (count 5). (§§ 245, subd. (a)(4), 368, subd. (b)(1), 148, subd. (a)(1), 166, subd. (a)(4).) The jury also found that Murphy personally inflicted great bodily injury on a victim who was 70 years of age or older (counts 1 and 2). (§ 12022.7, subd. (c).)

The trial court sentenced Murphy to an upper four-year term for the assault (count 1), stayed sentence for the elder abuse pursuant to section 654 (count 2), and imposed one-year terms to be served concurrently for the remaining three counts. The court also imposed a five-year prison term for the great bodily injury enhancement of section 12022.7, subdivision (c), for a total sentence of nine years. In addition, the court imposed a \$4,000 restitution fine, a \$4,000 parole revocation restitution fine (suspended), a \$200 court security assessment, and a \$150 criminal conviction assessment; ordered victim restitution; and awarded Murphy 121 days of presentence custody credit. (§§ 1202.4, subd. (b), 1202.45, 1465.8, subd. (a); Gov. Code, § 70373.)

Murphy appeals and contends that: 1) the trial court erred by admitting evidence of his 2014 criminal threats conviction; 2) the trial court erred by admitting evidence of the police vehicle videotape recording; 3) cumulative evidentiary error resulted in

prejudice; and 4) the trial court abused its discretion at sentencing by using the same circumstance to impose the enhancement and the upper term of imprisonment.

DISCUSSION

*I.*³

Murphy argues that the trial court abused its discretion by admitting evidence of his 2014 misdemeanor conviction for making criminal threats. He points out that he objected on the grounds that the 2014 conviction involved different factual circumstances and its admission was unduly prejudicial pursuant to section 352. Murphy contends that the evidence is inadmissible propensity evidence precluded by section 1101, subdivision (a), that permitted the jury to draw a prejudicial inference of a pattern of misconduct.

The trial court overruled Murphy's objection and ruled that the prejudicial effect of the evidence did not outweigh its probative value. The court also reasoned that the 2014 conviction was relatively recent, concerned misdemeanor conduct, and was relevant to count 5, violation of the 2014 protective order.

Section 1101, subdivision (a) prohibits the admission of character evidence if offered to prove conduct in conformity with that character trait, sometimes described as propensity evidence. (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 405-406.) Section 1101, subdivision (b) permits evidence of a prior or uncharged act, however, when relevant to prove some other disputed fact. (*Bryant, Smith and Wheeler*, at p. 406.) "If [a prior conviction] is relevant to prove some fact other than propensity,

³ All statutory references in parts I and II refer to the Evidence Code.

the evidence is admissible, subject to a limiting instruction upon request.” (*Ibid.*)

Even if prior acts evidence is otherwise admissible, a defendant may assert that section 352 precludes the evidence. (*People v. Bryant, Smith and Wheeler, supra*, 60 Cal.4th 335, 406.) Pursuant to section 352, a trial court may exclude otherwise relevant evidence if its probative value is substantially outweighed by concerns of undue prejudice, confusion, or consumption of time. (*People v. Edwards* (2013) 57 Cal.4th 658, 713.) Evidence is substantially more prejudicial than probative if it presents an intolerable risk to the fairness of the proceedings or the reliability of the outcome. (*People v. Case* (2018) 5 Cal.5th 1, 43; *People v. Eubanks* (2011) 53 Cal.4th 110, 144 [“undue prejudice” as used within section 352 refers to prejudging a person on the basis of extraneous factors].) We test the court’s ruling pursuant to section 352 for an abuse of discretion; that is, whether the court exercised its discretion in an arbitrary or unreasonable manner. (*People v. Thompson* (2016) 1 Cal.5th 1043, 1114; *People v. Suff* (2014) 58 Cal.4th 1013, 1066.)

The trial court did not abuse its discretion by admitting evidence of the 2014 misdemeanor conviction. Section 1101, subdivision (b) includes “a crime, civil wrong, or other act” as may bear upon Murphy’s intent or the absence of mistake. By pleading not guilty, a defendant places all elements of the charged offense in dispute. (*People v. Bryant, Smith and Wheeler, supra*, 60 Cal.4th 335, 407; *People v. Scott* (2011) 52 Cal.4th 452, 471 [defendant’s intent becomes a disputed fact when raised by a not guilty plea].) Here Murphy was convicted in 2014 of making unspecified criminal threats against Jerry and a protective order ensued. Murphy testified that he did not threaten or injure his father in the current incident - Jerry slipped from the scooter

onto the floor by accident. Evidence of the 2014 conviction thus was relevant to Murphy's "intent, [and] . . . absence of mistake or accident." (§ 1101, subd. (b).) Moreover, evidence of the 2014 conviction was no more inflammatory than the present charges and rested upon a conviction, not an uncharged prior act. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405, superseded by statute as stated in *People v. Robertson* (2012) 208 Cal.App.4th 965, 991.) The 2014 conviction and the protective order that ensued were also admissible at trial regarding count 5, violation of a protective order. The court's ruling is reasonable, and not arbitrary, and, therefore, not an abuse of discretion.

II.

Murphy contends that the trial court abused its discretion by admitting evidence of the patrol vehicle videotape recording, as redacted. He points out that the recording reflects his angry threats to the deputies, as well as many profane remarks. Murphy asserts that the evidence is irrelevant and unduly prejudicial pursuant to section 352.

The trial court edited the videotape transcript from 24 pages to five and one-half pages. The edited version of the profanity-laced videotape reflects these statements by Murphy: "I'm gonna bust your knee caps motherfucker. You better stay the fuck away from me motherfucker. . . . I swear to God, I'm gonna break your fucking kneecaps. Fucking assholes. . . . I'll fucking kill you. . . . All I got to say is shit will happen man. . . . Taking care of your fucking kids man and your wife. Yeah, I think you should take care of your fucking wife and your kids first."

Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (§ 210.) The

trial court is vested with wide discretion to determine the relevance of evidence. (*People v. Alexander* (2010) 49 Cal.4th 846, 904.) In reviewing a relevancy contention, we consider whether the challenged evidence satisfied the requirements of section 210, and whether the trial court abused its discretion pursuant to section 352 by a finding that the probative value of the evidence was not substantially outweighed by the substantial danger of undue prejudice. (*Alexander*, at pp. 903-904.) Unduly prejudicial evidence is that which creates an intolerable risk to the fairness of the proceedings or the reliability of the outcome. (*People v. Case, supra*, 5 Cal.5th 1, 43.)

Here Murphy's recorded statements were relevant to the charged counts of resisting or obstructing a peace officer in the performance of his duties. The statements were a continuation of Murphy's efforts to prevent the deputies from entering Jerry's home and investigating the assault. Moreover, the statements also reflected Murphy's consciousness of guilt as an attempt to prevent charges by threatening the deputies. Murphy testified that he had consumed alcohol the day of the incident and the deputies concluded that he was intoxicated when he responded at the front door. The profanities uttered by the obviously intoxicated Murphy could not have presented an intolerable risk to the fairness of the proceedings or the reliability of the outcome. (*People v. Case, supra*, 5 Cal.5th 1, 43.) Any revulsion caused by the recording is attributable to Murphy's behavior, not to any sensationalism of the recording. (*People v. Cage* (2015) 62 Cal.4th 256, 284.) Murphy has not established an abuse of discretion because the trial court's decision was reasonable and not arbitrary.

III.

Murphy contends that the trial court abused its discretion by sentencing him to the upper term for count 1 (assault by means likely to produce great bodily injury) based upon the same factual circumstances involved in the section 12022.7, subdivision (c) enhancement (infliction of great bodily injury upon a victim 70 years or older). (*People v. Scott* (1994) 9 Cal.4th 331, 350.) Murphy points out that in selecting the upper term, the court relied in part upon the factor that Jerry was particularly vulnerable.

The trial court may not impose an upper sentencing term by using the fact of any enhancement upon which sentence is imposed unless the court strikes the punishment for the enhancement. (§ 1170, subd. (b) [“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”]; Cal. Rules of Court, rule 4.420(d) [“A fact that is an element of the crime on which punishment is being imposed may not be used to impose a particular term”].) A single factor in aggravation, however, is sufficient to support imposition of an upper term. (*People v. Black* (2007) 41 Cal.4th 799, 815; *People v. Sperling* (2017) 12 Cal.App.5th 1094, 1103.) It has long been the law that the court possesses discretion in selecting the sentencing term. (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.)

Here the probation report lists as aggravating factors that the victim was particularly vulnerable; defendant took advantage of a position of trust; defendant has engaged in violent conduct indicating a serious danger to society; defendant’s prior conviction as an adult are numerous or of increasing seriousness; defendant was on probation or parole when committing the present crime; and defendant’s performance on probation or

parole was unsatisfactory. At sentencing, the trial court indicated that it had read the prosecutor's sentencing brief and the defendant's probation report. The trial judge then stated that he agreed with the aggravating factors set forth in those documents: "[Jerry] was particularly vulnerable. [Murphy] took advantage of a position of trust. . . . [A]lthough [Murphy has] not been convicted of a felony before, [he has] had crimes of violence and . . . the conduct was escalating."

Murphy has forfeited this claim because he did not object to the "dual use" of facts at sentencing. (*People v. Scott, supra*, 9 Cal.4th 331, 340; *id.* at p. 353 [forfeiture rule applies to claim that court "double-counted" a sentencing factor]; *People v. Sperling, supra*, 12 Cal.App.5th 1094, 1100; *People v. Erdelen* (1996) 46 Cal.App.4th 86, 90-91.) A party in a criminal case may not raise appellate claims involving the court's failure to properly make or articulate its discretionary sentencing choices if he did not object at trial. (*People v. Gonzalez* (2003) 31 Cal.4th 745, 751; *Sperling*, at p. 1100.) The forfeiture rule ensures that the opposing party is given an opportunity to address the objection, and it prevents a party from engaging in gamesmanship by choosing not to object, awaiting the outcome, and then claiming error. (*Sperling*, at p. 1101.) "Had [appellant] timely and specifically objected below, the trial court presumable would have had an opportunity to correct, and could have corrected, any error." (*Ibid.*)

Forfeiture aside, the trial court did not make a dual use of facts. The enhancement punishing the infliction of great bodily injury on a person 70 years or older does not necessitate circumstances of particular vulnerability or an abuse of trust. Jerry was vulnerable because he was disabled and trusted his son who lived with him in his home and served as his caretaker.

Victim vulnerability and abuse of trust or confidence are circumstances in aggravation permitting an upper term sentence. (Cal. Rules of Court, rule 4.421(a)(3) & (11); *People v. Sperling, supra*, 12 Cal.App.5th 1094, 1102-1103 [aggravating sentencing circumstance of vulnerability distinct from statutory element of crime requiring victim be incapable of consent due to mental, developmental, or physical disability].)

In any event it is not reasonably probable that Murphy would obtain a more favorable sentence in the absence of the vulnerability finding. (*People v. Osband* (1996) 13 Cal.4th 622, 728-729.) The trial court stated other aggravating factors which Murphy did not dispute. The sentence imposed is reasonable and not an abuse of discretion. (*People v. Carmony, supra*, 33 Cal.4th 367, 376-377 [trial court presumed to have acted to achieve legitimate sentencing objectives].)

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Craig B. Van Rooyen, Judge

Superior Court County of San Luis Obispo

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