Filed 8/15/12 P. v. Ward CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. DEVIN ANDREW WARD, Defendant and Appellant.	B233006 (Los Angeles County Super. Ct. No. BA348370)

APPEAL from an order of the Superior Court of Los Angeles County, John S. Fisher, Judge. Affirmed.

Law Offices of George L. Steele, George L. Steele and Michelle H. Iarusso, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Colleen M. Tiedemann, Paul M. Roadarmel, Jr. and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

Devin Andrew Ward appeals from the order revoking his probation and sentencing him to an aggregate state prison term of seven years for his underlying conviction of aggravated assault with a great bodily injury enhancement. Ward contends the court improperly revoked probation and erred in imposing both the four-year upper term for assault by means likely to produce great bodily injury and the three-year great bodily injury enhancement. We affirm both the order revoking probation and the court's sentencing decision.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Ward's Guilty Plea to Aggravated Assault with Great Bodily Injury*

According to the evidence at Ward's preliminary hearing, Ward's car bumped the rear of Robert Colangelo's car at the intersection of Sixth Street and Cochran Avenue in Los Angeles on Thursday evening, September 25, 2008, as Colangelo stopped for a traffic signal that had turned yellow. Colangelo testified, "[T]he car behind me tapped me as if I weren't going fast enough through the intersection." Colangelo left his car to inspect for damage. Ward also got out of his car, screaming because he believed Colangelo had cut him off. Colangelo described Ward, who was standing inches away from his face, as "in an absolute tirade and rage."

Colangelo said, "Look, there's no damage to the car, there's nobody injured, let's just get out of here." Ward responded by shouting, "What are you going to do about it, what are you going to do about it?" According to Colangelo, "He got in my face. I put up my hands to defend myself." Colangelo added, "It appeared he was going to strike me." Ward shouted, "You put your hands on me," and punched Colangelo in the eye.[1] Ward's blow broke all the bones in Colangelo's left eye socket. As a result of that single

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[1] In his sentencing memorandum Ward's counsel described the confrontation somewhat differently, asserting Colangelo had "used force to push defendant Ward." Ward responded with a single punch "to protect himself and his pregnant wife," who was with him in the car. Because Ward pleaded guilty rather than go to trial, his more benign version of the attack is not supported by any evidence.

punch, Colangelo had three eye surgeries, two facial reconstruction surgeries, was out of work for five months and lost vision in the eye.

Pursuant to an indicated disposition from the court, on September 3, 2009, the day trial was to begin, Ward pleaded guilty to one count of assault by means of force likely to produce great bodily injury (formerly Pen. Code, § 245, subd. (a)(1), now § 245, subd. (a)(4)) and admitted the truth of the special allegation he had personally inflicted great bodily injury on his victim (Pen. Code, § 12202.7, subd. (a)). As explained by the People and the court at the plea hearing, imposition of sentence would be stayed, and Ward ordered as a condition of probation to serve 365 days in county jail. Ward was specifically advised, "if you violate any of the terms and conditions of your probation, you could go to state prison for up to seven years." Ward acknowledged he understood.

The sentencing hearing was held on November 2, 2009; and, as agreed, Ward was placed on probation on condition he serve 365 days in county jail, complete anger management training, obey all laws and orders of the court and obey all rules and regulations of the Probation Department. Ward was also ordered to pay victim restitution to Colangelo of $58,410. Additional charges of mayhem (Pen. Code, § 203) and battery with serious bodily injury (Pen. Code, § 243, subd. (d)) were dismissed in the interest of justice. (Pen. Code, § 1385.)

2. *The Charge of Domestic Violence and Revocation of Ward's Probation*

On January 13, 2011 the District Attorney moved to revoke Ward's probation, alleging he had violated his probation by willfully inflicting corporal injury upon a cohabitant, Dana Luong, who is also the mother of his child, in violation of Penal Code section 273.5, subdivision (a). Luong had gone to the police station on December 21, 2010 and reported that she and Ward had argued after she refused to have sex with him and Ward then attempted to strangle her. The officer who initially interviewed Luong confirmed there were two light red marks on the right side of her neck and a small cut on the back of her neck. Luong also described another incident of domestic violence that had occurred earlier in the month.

On February 4, 2011 the court summarily revoked probation and remanded Ward to custody. The formal revocation hearing began on March 3, 2011. Luong testified, describing both the attack on December 21, 2010 and other instances of Ward's verbal and emotional abuse. According to Luong, she lived under a constant threat of physical violence. The matter was then continued until April 6, 2011. Ward testified on his own behalf, denying he had ever attacked or threatened Luong. One of the investigating police officers, who interviewed Ward five days after the incident, testified Luong did not appear to him to have sustained any injuries.

After hearing argument from counsel, the court found Ward in violation of probation. After further argument the court denied reinstatement of probation and sentenced Ward to an aggregate state prison term of seven years, the upper term of four years for the aggravated assault and an additional three years for the great bodily injury enhancement.

3. *The Court's Sentencing Decision*

Prior to sentencing, defense counsel argued the incident of domestic violence was not very serious, "the injuries appear under the best of circumstances to be very minor," and urged the court to give the lowest possible state prison commitment. The prosecutor, on the other hand, responded that Ward "should be maxxed out," stressing the very serious nature of the underlying offense and insisting, "He's a violent man. And he was given anger management. He was given time in county jail and apparently to no avail. There's been absolutely no rehabilitation."

In sentencing Ward to the maximum term permitted by his guilty plea, the court emphasized, "even the defense admitted that the underlying crime is pretty vicious where one blow apparently in the face caused significant injuries." The court explained the sentencing really did not depend on "whether the [current probation] violation itself was a big deal or not . . . . If he got a speeding ticket, theoretically he'd be in violation." The court then noted Ward had pleaded guilty "to basically a road rage situation . . . where he kind of beat the crap out of a guy. . . . [T]he court sentences him because of the nature of

the injuries and the unprovoked -- I mean, your -- the client clearly has an anger situation here and it's really grossly unsocial conduct that requires punishment."

Defense counsel inquired, "[W]ould the court consider mid term on this instead of high term?" The court replied, "No . . . I think that his lady is in extreme danger. . . . [A]s far as I'm concerned your client is a danger to her and the public by his actions."

CONTENTIONS

Ward contends the trial court erred in revoking probation based on the inconsistent testimony of a biased witness (the victim), improperly excluded exculpatory evidence at the revocation hearing, violated several procedural requirements in connection with the revocation hearing and unlawfully sentenced him to an aggregate state prison term of seven years by using the same fact to impose both the upper term and the great bodily injury enhancement. He also contends his sentence violates California's prohibition of cruel or unusual punishment and is a miscarriage of justice.

DISCUSSION

1. *Substantial Evidence Supports the Decision To Revoke Probation*

A court may revoke probation "if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation officer or otherwise that the person has violated any of the conditions of his or her probation . . . ." (Pen. Code, § 1203.2, subd. (a); *People v. Galvan* (2007) 155 Cal.App.4th 978, 981; *People v. Stanphill* (2009) 170 Cal.App.4th 61, 72.) We review a decision to revoke for substantial evidence (*People v. Superior Court* (*Jones*) (1998) 18 Cal.4th 667, 681), according great deference to the trial court's ruling, "bearing in mind that '[probation is not a matter of right but an act of clemency, the granting and revocation of which are entirely within the sound discretion of the trial court.'" (*People v. Urke* (2011) 197 Cal.App.4th 766, 773; accord, *People v. Pinon* (1973) 35 Cal.App.3d 120, 123.) "Before a defendant's probation may be revoked, a preponderance of the evidence must support a probation violation." (*People v. Shepherd* (2007) 151 Cal.App.4th 1193, 1197; accord, *People v.*

Rodriguez (1990) 51 Cal.3d 437, 447 [standard of proof for finding probation violation is preponderance of the evidence].)

Ward contends it was error for the court to conclude he had attacked Luong because Luong gave somewhat inconsistent versions of the circumstances surrounding the incident when she spoke to different police officers (specifically, whether she was holding her son while Ward attempted to choke her) and because she had admitted her relationship with Ward was deteriorating and acknowledged she hoped to gain full custody of their child. We reject this invitation to reweigh Luong's credibility, a task firmly committed to the trial court. (See *People v. Zamudio* (2008) 43 Cal.4th 327, 357 ["'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.'"].)

2. *The Court Did Not Abuse Its Discretion in Sustaining an Objection to Evidence of Ward's Out-of-court Denial of the Attack*

Los Angeles Police Officer Merav Tyler went to Luong and Ward's home on December 26, 2010 as a "civil stand by" to keep the peace while Luong gathered her belongings. She testified she did not know any of the details of the domestic violence charge and did not ask questions about it. However, while in the house, she spoke to both Luong and Ward. Luong told her Ward was a violent man and she did not want him to see their son again although she also said Ward had never hit the child or placed the child in a dangerous situation.

According to the police report on the follow-up investigation, Officer Tyler told the investigating officer Ward had denied choking Luong. However, when asked by Ward's counsel if the paragraph in that report accurately reflected what she told the investigating officer, Tyler testified, "There was just one part of it that I didn't recall him telling me or saying, and that was on the paragraph that says, the 26th, that I went there and the last line said that he said he didn't choke—there was something about choking,

but I don't remember him ever saying that to me." A short time later Ward's counsel specifically asked, "[D]o you recall asking [Ward] whether he had ever choked her or anything of that nature?" The prosecutor objected the question called for hearsay; the court sustained the objection.

Ward's contention the court prejudicially abused its discretion in sustaining the objection suffers from multiple flaws. First, given that Officer Tyler had already testified she did not remember Ward denying he had choked Luong, as set forth in the police investigative report, it is hard to imagine her answer to the question would have been any different a minute or two later. Second, even if Tyler had recalled Ward's denial of the attack, the hearsay objection was well taken. Ward does not contend otherwise on appeal, nor does he identify any applicable exception to the hearsay rule or argue the purported denial was accompanied by a substantial degree of trustworthiness that would justify its admission at a probation revocation hearing. (See *People v. Maki* (1985) 39 Cal.3d 707, 715-717 [otherwise inadmissible hearsay evidence may be considered at revocation hearing when accompanied by reasonable indicia of reliability]; *People v. Arreola* (1994) 7 Cal.4th 1144, 1157, 1159 [if proffered hearsay testimony is testimonial in nature, "good cause," as well as reliability, must be established].) Finally, Ward himself testified at the revocation hearing, providing the court with the opportunity to judge his credibility. Ward's earlier denial of the charge, had Tyler recalled it, would have been entirely cumulative,[2] and Tyler's assessment of his credibility—even if she had one—irrelevant.

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[2] As discussed, in addition to Ward's in-court denial of any attack on Luong, Officer Tyler disclosed in her earlier testimony that the police investigative report stated he told Tyler he had not choked Luong.

3. *Ward Has Forfeited His Claim He Was Not Provided Adequate Notice of the Revocation Hearing*

Ward contends the record does not reflect he was given proper notice of the motion to revoke probation as required by Penal Code section 1203.2, subdivision (b).[3] The record does reflect, on the other hand, that Ward, represented by counsel, was present in court when probation was summarily revoked on February 4, 2011 and the formal revocation hearing was scheduled for March 3, 2011; Ward, represented by counsel, was present at the commencement of the revocation hearing on March 3, 2011 and, pursuant to a discussion between the court and counsel, it was agreed the People would present their case on that date and Ward's counsel would present his defense at a subsequent hearing date; and Ward with his attorney were present in court on April 6, 2011 when the defense, including testimony by Ward, to the domestic violence charge was presented. At no time during any of these court appearances did Ward or his counsel object to the adequacy of the notice that had been provided. Accordingly, even if there were any procedural irregularities with notice in this case, that claim has been forfeited. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1153 [defendant waived claim prosecutor failed to give required statutory notice by participating in hearing and failing to timely object]; *People v. Scott* (1994) 9 Cal.4th 331, 354 ["claims deemed waived on appeal [by failure to object in trial court] involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner"]; *People v. Welch* (1993) 5 Cal.4th 228, 234.)

4. *The Court Did Not Err in Terminating Ward's Father's Mitigation Statement*

After the court found Ward had violated his probation and indicated it intended to impose a state prison sentence, Ward's father addressed the court, apparently to urge leniency. However, rather than discussing his son, the father began to disparage Luong, the victim. The court interrupted and admonished the father, "I don't need to hear that

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[3] Significantly, Ward does not suggest he did not have notice, only that the record on appeal (the clerk's transcript) does not adequately document it.

statement. If you want to talk about mitigation of your—of the son, that's what—that's what—I've already made a factual call on this. So I don't need to hear what your opinion of her is at this time." Rather than proceed as the court had directed, however, the father returned to his view of the victim. "Okay. I just felt that Dana [Luong] had more . . . ." At this point the court interrupted again and told the father to sit down.

Ward argues it was an abuse of discretion for the court to refuse to hear his father's statements in mitigation, citing to California Rules of Court, rule 4.423(a) and (b),[4] which identifies factors in mitigation relating to the crime and to the defendant that may be considered by the court in sentencing. However, as discussed more fully below, rule 4.435(b)(1) expressly prohibits the court from considering events subsequent to the time probation was granted when imposing sentence following the revocation of probation. Thus, any information about Luong or the circumstances of the incident that provided the basis for revoking probation was irrelevant. With respect to information about Ward himself, in his brief in this court Ward complains the court "could easily have instructed Mr. Ward's father to proceed with information concerning Mr. Ward instead and not the alleged victim." That is precisely what the court did. The court terminated the continued statement only when the father refused to follow its direction and once again began to criticize the victim. There was no abuse of discretion.

5. *The Failure To Obtain a Supplemental Probation Report Was Harmless*

A preconviction probation report was prepared in February 2009 and filed in November 2009 following Ward's guilty plea to the charge of aggravated assault with great bodily injury. When probation was summarily revoked on February 4, 2011, the court ordered preparation of a supplemental probation report. It does not appear a supplemental report was ever received. Ward argues that omission is reversible error.

Penal Code section 1203, subdivision (b), requires a presentence probation report in every case in which the defendant has been convicted of a felony and is eligible for probation. (See rule 4.411(a) [if defendant is eligible for probation, court must refer

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[4] Citations to rule or rules are to the California Rules of Court.

matter to probation officer for presentence investigation and report].) In addition, "[t]he court must order a supplemental probation officer's report in preparation for sentencing proceedings that occur a significant period of time after the original report was prepared." (Rule 4.111(c).) We agree with Ward the lapse of time between the original preconviction report in February 2009 and his sentencing following revocation of probation in April 2011 is a "significant period of time." (See *People v. Dobbins* (2005) 127 Cal.App.4th 176, 181 [period of six months may constitute a significant period of time requiring preparation of a supplemental probation].) We also agree with Ward, although the court ordered a supplemental report, nothing in the record—either the clerk's transcript or the reporter's transcript of the sentencing proceedings—indicates a supplemental report was received. Certainly nothing the court said in explaining its sentencing decision suggested it had received and considered a supplemental probation report.

Nonetheless, any failure to obtain a supplemental report was harmless. Rule 4.435(b) provides, "On revocation and termination of probation under section 1203.2, when the sentencing judge determines that the defendant will be committed to prison: [¶] (1) If the imposition of sentence was previously suspended . . . . [¶] The length of the sentence must be based on circumstances existing at the time probation was granted, and subsequent events may not be considered in selecting the base term or in deciding whether to strike the additional punishment for enhancements charged and found." (See also *People v. Goldberg* (1983) 148 Cal.App.3d 1160, 1163, fn. 2 [court is prohibited under California Rules of Court from considering events subsequent to the grant of probation when determining length of prison term upon revocation of probation].) Thus, any circumstances or events, whether aggravating or mitigating, that occurred subsequent to November 2, 2009, including details of Ward's compliance with the conditions of probation, were simply irrelevant to the court's sentencing decision.[5]

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[5] Rule 4.435 does not preclude the court from considering events occurring after the initial grant of probation when deciding whether to reinstate probation after finding a

On the other hand, the details of the underlying offense, including Ward's claim he had acted in self-defense after Colangelo pushed him, and Ward's preconviction history were before the court by virtue of defendant's sentencing memorandum and the initial probation report, which expressly noted Ward's lack of criminal record as a factor in mitigation. It is not reasonably probable a result more favorable to Ward would have been obtained if not for the error. (See *People v. Dobbins, supra*, 127 Cal.App.4th at p. 182 ["[b]ecause the alleged error [in failing to obtain supplemental probation report] implicates only California statutory law, review is governed by the *Watson* harmless error standard"].)

6. *Ward Has Forfeited His Sentencing Claims Based on Dual Use of Facts*

Courts have broad sentencing discretion, and we review a trial court's sentencing choices for abuse. We reverse only if there is a clear showing the sentence was arbitrary or irrational. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847; *People v. Moberly* (2009) 176 Cal.App.4th 1191, 1196; *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582-1583.) A trial court abuses its discretion if it relies upon circumstances that are not relevant to, or that otherwise constitute an improper basis for, the sentencing decision. (*Sandoval*, at p. 847; *Moberly*, at p. 1196.)

Under Penal Code section 1170, when a statute specifies three possible terms, choice of the appropriate term rests within the trial court's discretion. (Pen. Code, § 1170, subd. (b).) The court may consider the record in the case, the probation report, evidence introduced at the sentencing hearing and "any other factor reasonably related to the sentencing decision," and "shall select the term which, in the court's discretion, best

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probation violation. (See *People v. Jones* (1990) 224 Cal.App.3d 1309, 1316, fn. 4; *People v. White* (1982) 133 Cal.App.3d 677, 681-682.) Ward's trial counsel, however, did not argue for reinstatement of probation, asking only that the court consider sentencing him to the lower term for aggravated assault and staying imposition of the great bodily injury enhancement. On appeal, too, prior to oral argument counsel did not contend the trial court abused its discretion by sentencing Ward to state prison rather than reinstating probation. Instead, counsel has argued, but for the various alleged errors, Ward might have received a lesser sentence than seven years imprisonment.

serves the interests of justice." (Rule 4.420(b).) The existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for imposition of the upper term. (*People v. Black* (2007) 41 Cal.4th 799, 816; *People v. Osband* (1996) 13 Cal.4th 622, 728.)

Here, the trial court identified as aggravating factors the "pretty vicious" nature of Ward's attack on Colangelo, the significant injuries suffered by the victim, the fact the assault was the "unprovoked" product of "road rage" and the court's assessment Ward's actions constituted a danger to Luong and to the public.[6] Ward contends by imposing the great bodily injury enhancement and basing its selection of the upper term on the severity of Colangelo's injuries, the court improperly used the same fact twice in violation of Penal Code section 1170, subdivision (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"). (See rule 4.420(c) [court may use a fact charged and found as an enhancement as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so].) He also contends, because the assault involved only a single punch with a closed fist, the "pretty vicious" character of the blow and the fact "the force used was likely to product great bodily injury," an element of the offense itself, are the same thing; and the court was precluded from using this factor to impose the upper term. (Rule 4.420(d) ["fact that is an element of the crime upon which punishment is being imposed may not be used to impose a greater term"]); see *People v. Osband, supra,* 13 Cal.4th at p. 730.)

Ward has forfeited both of these claims by failing to object at the time of sentencing. "Ordinarily, an appellate court will not consider a claim of error if an objection could have been, but was not, made in the lower court. [Citation.] The reason for this rule is that '[i]t is both unfair and inefficient to permit a claim of error on appeal

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[6] The court also referred to Ward's "anger situation" and his "grossly unsocial conduct," but these seem to be simply somewhat different characterizations for the "pretty vicious" and "unprovoked" nature of the attack.

that, if timely brought to the attention of the trial court, could have been easily corrected or avoided.'" (*People v. French* (2008) 43 Cal.4th 36, 46.) This forfeiture (waiver) doctrine applies to claims the trial court failed to properly make a discretionary sentencing choice. (*People v. Scott* (1994) 9 Cal.4th 331, 356 ["complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal"]; see *People v. Tillman* (2000) 22 Cal.4th 300, 303 [People's failure to object to trial court's failure to state on the record its reasons for not imposing a restitution fine forfeited claim on appeal].) As the Supreme Court explained in *Scott*, "[T]he waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices. Included in this category are cases in which the stated reasons allegedly do not apply to the particular case, and case in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons. [¶] . . . Although the court is required to impose sentence in a lawful manner, counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. Routine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention. As in other waiver cases, we hope to reduce the number of errors committed in the first instance and preserve the judicial resources otherwise used to correct them." (*Scott*, at p. 353.)

A narrow exception to the forfeiture doctrine, permitting review of a sentencing error notwithstanding the failure of defense counsel to object in the trial court, applies in cases of "unauthorized" sentences. (*People v. Scott*, *supra*, 9 Cal.4th at p. 354; *People v. Smith* (2001) 24 Cal.4th 849, 852-853.) "Although the cases are varied, a sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case. Appellate courts are willing to intervene in the first instance because such error is 'clear and correctable' independent of any factual issues presented by the record at sentencing." (*Scott*, at p. 354; accord, *Smith* at p. 852 ["obvious legal

errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings are not waivable"].)

Even if the trial court relied, in part, on improper sentencing factors in this case, that reliance did not result in an unauthorized or unlawful sentence. The four-year upper term imposed for aggravated assault was properly based on the finding Ward's attack on Colangelo was the unprovoked product of road rage—a circumstance in aggravation relating to the nature of the crime entirely distinct from the strength of the blow (that is, by the use of force likely to produce great bodily injury) or the severity of the injury that resulted. (See rule 4.421(a); *People v. Cooper* (1984) 153 Cal.App.3d 480, 482 [unprovoked nature of attack properly relied upon as an aggravating factor in aggravated assault case]; see generally *People v. Black, supra,* 41 Cal.4th at p. 817 ["An aggravating circumstance is a fact that makes the offense 'distinctively worse than the ordinary.' [Citations.] Aggravating circumstances include those listed in the sentencing rules, as well as any facts 'statutorily declared to be circumstances in aggravation' [citation] and any other facts that are 'reasonably related to the decision being made.'"].) As discussed, the existence of a single factor in aggravation is sufficient for imposition of the upper term. (*People v. Osband, supra,* 13 Cal.4th at p. 728.)

7. *Ward Has Forfeited Any Challenge to the Sentence Based on the Court's Apparent Consideration of Events Subsequent to the Time Probation Was Imposed*

Notwithstanding rule 4.435(b), which, as discussed, prohibits consideration of events subsequent to the time probation was granted in determining a defendant's sentence upon revocation of probation, when urging the court to exercise leniency and impose "the lowest possible state prison commitment that the court would consider," Ward's counsel noted Luong had not suffered any serious injury in the assault and emphasized, until that incident of domestic violence, Ward had been in full compliance with the conditions of his probation. The prosecutor similarly looked to Ward's performance while on probation to argue for the maximum possible prison term, pointing out Ward had been given anger management training, yet "there's been absolutely no

rehabilitation." More importantly, the trial court also appeared to have considered events from the post-conviction probationary period—and specifically Ward's attack on Luong—in determining Ward's sentence, rejecting defense counsel's alternative request for the middle term by stating, "I think that his lady [Luong] is in extreme danger. . . . [A]s far as I'm concerned your client is a danger to her and the public by his actions. And as far as I'm concerned it's not going to be on my watch."

This troubling disregard for a fundamental sentencing principle has continued on appeal. Ward's appellate counsel suggested the lack of a supplemental probation report is prejudicial because it would have addressed Ward's compliance with probation conditions, purportedly a factor in mitigation. And the People contend the fact the court found Ward to be a danger to Luong was an aggravating factor justifying imposition of the upper term for the assault on Colangelo. Neither party has cited rule 4.435 in their briefs or questioned the propriety of the trial court's reliance on the attack on Luong as a basis for its sentencing decision.[7] Nonetheless, any challenge to the trial court's apparent violation of rule 4.435(b), like the other flaws in its articulation of its discretionary sentencing decision discussed in the preceding section, has been forfeited because no objection was made in the trial court. (See *People v. Scott, supra,* 9 Cal.4th at pp. 353, 356.)

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[7] This court called the parties' attention to rule 4.435 and invited supplemental letter briefs addressing its effect, if any, on the sentencing issues presented by Ward's appeal. In response, the People argued Ward has forfeited any claim the trial court violated rule 4.435(b)(1) and, in any event, it is not reasonably probable the court would have imposed a lesser sentence if it had not relied in part on events subsequent to the time probation was granted (the attack on Luong). Ward, in contrast, contends the apparent violation of rule 4.435(b)(1) is reviewable on appeal under *People v. Scott, supra*, 9 Cal.4th 331 and *People v. Smith, supra*, 24 Cal.4th 849 as "an obvious legal error" although the sentence imposed was not unlawful and only the statement of reasons was improper.

8. *Ward's Seven-year Sentence Does Not Violate California's Prohibition Against Cruel or Unusual Punishment and Does Not Constitute A Miscarriage of Justice*

To prevail on his claim his seven-year state prison sentence constitutes cruel or unusual punishment in violation of the California Constitution, Ward must overcome a "considerable burden" (*People v. Wingo* (1975) 14 Cal.3d 169, 174) by demonstrating the punishment is so disproportionate to the crime for which it was imposed it "shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424; see *People v. Dillon* (1983) 34 Cal.3d 441, 478.)[8] The *Lynch* court identified three factors for the reviewing court to consider in assessing this constitutional claim: (1) the nature of the offense and the offender; (2) how the punishment compares with punishments for more serious crimes in the jurisdiction; and (3) how the punishment compares with the punishment for the same offense in other jurisdictions. (*Id.* at pp. 425-427.)[9]

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[8] Technically, Ward forfeited this argument by failing to raise it in the trial court. (See, e.g., *People v. Norman* (2003) 109 Cal.App.4th 221, 229 [because cruel or unusual punishment claim requires fact-specific determination about the offense and the offender, it must be raised initially in the trial court]; *People v. Kelley* (1997) 52 Cal.App.4th 568, 583.) "Nonetheless, we shall reach the merits under the relevant constitutional standards, in the interest of judicial economy to prevent the inevitable ineffectiveness-of-counsel claim." (*Norman*, at p. 229.)

[9] Ward contends California appellate courts have not applied the third *Lynch* prong after the United States Supreme Court held evaluating an Eighth Amendment cruel and unusual punishment claim did not require intercase proportionality review, citing as support for this position *People v. Babbitt* (1988) 45 Cal.3d 660, 725-726, a capital case. The Attorney General agrees, in part, explaining, subsequent to *Lynch* the California Supreme Court held in capital cases, if the punishment is proportionate to the defendant's individual culpability (intracase proportionality), there is no requirement it be proportionate to the punishment imposed in other, similar cases. (See, e.g., *People v. Webb* (1993) 6 Cal.4th 494, 536.) However, intercase proportionality review is still appropriately conducted in noncapital cases. (See *People v. Dement* (2011) 53 Cal.4th 1, 58; *People v. Farley* (2009) 46 Cal.4th 1053, 1134.)

With respect to the first *Lynch* prong, Ward emphasizes he had no criminal record before he assaulted Colangelo. As to the second prong, Ward notes the "chance" nature of the serious injury to the victim and argues he did not instigate an extensive fight, use a weapon or throw multiple punches. He also insists (as he did in the sentencing memorandum submitted to the court at the time of initial sentencing) he acted in self-defense. Collectively, he contends, these circumstances establish, while the injury sustained was serious, Ward's culpability was not, and the punishment imposed, therefore, grossly disproportionate.

The People, on the other hand, in assessing Ward and his offense as required by *Lynch*, describe the assault as a violent attack over a petty traffic dispute. In addition, they note the probation report found Ward "has a rage and anger problem that is likely to result in additional destructive behavior." As to the severity of the punishment, although four years is the maximum sentence for an aggravated assault without the great bodily injury enhancement, Ward admitted the enhancement allegation and acknowledged he could receive a seven- year sentence if he violated probation. The upper term for mayhem, one of the other charges against Ward,[10] is eight years. (Pen. Code, § 204.) Moreover, as the People demonstrate, the seven year sentence Ward received is less than would have been imposed in several other jurisdictions for the same or similar offenses. The trial court was entitled to view the underlying crime and related great bodily injury enhancement in the light presented by the People. Considering the totality of the circumstances, Ward has not demonstrated his sentence was so grossly disproportionate to his offense as to violate the California Constitution. (See *People v. King* (1993) 16 Cal.App.4th 567, 572 [defendant's burden to establish punishment is unconstitutional]; *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196-1197 [because

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[10] To prove Ward committed mayhem, the People would have to establish he caused serious bodily injury (blinded Colangelo in one eye) through an intentional unlawful act (an assault). (See Pen. Code, § 203; CALCRIM No. 801.)

Legislature determines the appropriate penalty for criminal offenses, defendant must persuade court sentence was disproportionate to his or her level of culpability].)

Finally, Ward argues his seven year sentence resulted in a miscarriage of justice, citing California Constitution article VI, section 13 ("[n]o judgment shall be set aside, or new trial granted, in any cause . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice"). As Ward appears to recognize, the "miscarriage of justice" standard is a test for evaluating whether errors that may have occurred in the trial court require reversal, not an independent basis for reviewing trial court proceedings. Here, we have already determined, to the extent any claims of error in the probation revocation or sentencing proceedings were properly preserved for appeal, either no error or abuse of discretion was committed or it is not reasonably probable Ward would have achieved a more favorable result had the error not occurred. (See *People v. Breverman* (1998) 19 Cal.4th 142, 149 [constitutional "miscarriage of justice" test not met unless *Watson* standard for prejudicial error has been satisfied].)

DISPOSITION

The order revoking Ward's probation and sentencing him to an aggregate state prison term of seven years is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J. JACKSON, J.