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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBIN MILLER,

Defendant and Appellant.

B229662

(Los Angeles County
Super. Ct. No. NA081509)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Tomson T. Ong, Judge. Affirmed.

Joy A. Maulitz, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson and
Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Robin Miller appeals from the judgment entered following his conviction by jury of attempted murder, with findings that he used a knife during the commission of the offense and personally inflicted great bodily injury upon the victim. (Pen. Code, §§ 664/187; 12022, subd. (b); 12022.7, subd. (a).)¹ He was sentenced to 13 years in prison. His sole contention is that the trial court abused its discretion by imposing the upper term sentence for the attempted murder. We affirm.

STATEMENT OF FACTS²

On the night of March 21, 2009, Vincent McLeod was at the Springbok Bar & Grill with his fiancée and friends, including his best man for the upcoming wedding, Gurjit Samra. At approximately 10:30 p.m., McLeod prepared to leave and walked to the parking lot accompanied by Samra. They stood by McLeod's car and talked. Samra noticed a man walking in the area of the restaurant, but paid little attention to him. As he and McLeod continued to converse, Samra saw the man standing behind McLeod's shoulder. Samra assumed the man, who appeared homeless, was going to ask for directions or money. Without speaking a word, the man swung his arm and struck McLeod in the neck. McLeod felt a sharp pain, looked behind him, and saw defendant.³ McLeod felt blood coming out of his neck. He put his hand on the wound to put pressure on it and ran back into the bar. While inside, he removed his hand, causing blood to gush from the wound. A nurse got McLeod to lie on the ground. She recognized that McLeod's artery had been punctured and she used towels to maintain pressure on the wound until paramedics arrived.

¹ In a bifurcated proceeding, the jury found defendant was sane during the commission of the crime.

² As defendant does not challenge the sufficiency of the evidence, we set forth an abbreviated version of the facts.

³ Samra was unable to identify defendant as McLeod's assailant.

Samra took a step toward defendant and asked, “What the fuck was that?” After Samra repeated the question several times, defendant raised his fist and said, “Do you want one, too?” At that point, Samra noticed that defendant had a Swiss army knife in his hand. Samra responded, “No.” Defendant backed up, stopped to pick up a bag, and walked away.

Defendant was apprehended by police a short distance away. A Swiss army knife was found in his right front pants pocket. Defendant told the officer who detained him that he had stabbed someone. At the station, defendant admitted to a second officer that he stabbed a man in the neck and wanted to kill him. When asked why he stabbed the victim, defendant said, “I stabbed him in the neck because I wanted the other guy to go down to the water with me for some personal business.” He also stated, “I had to pop some air into some of those idiots.” The officer continued to speak to defendant to ascertain whether he suffered from mental illness. Defendant denied that he did.

McLeod spent seven days in the hospital, undergoing surgery to repair his carotid artery and a jugular vein. As a result of the attack, McLeod has limited range of motion.

DISCUSSION

Defendant’s attorney filed a sentencing memorandum, asking the court to sentence defendant to the low term for the attempted murder. With the enhancements, the resulting sentence would be nine years. Counsel acknowledged there were two aggravating factors, the infliction of great bodily injury and the use of a weapon, but argued defendant was not subject to additional time for those factors because of the alleged enhancements. Counsel argued substantial evidence demonstrated that although defendant was legally sane at the time he stabbed the victim, he suffered from mental illness. The attorney contended there were four mitigating factors: (1) the crime was committed because of an unusual circumstance (defendant’s mental illness) that is unlikely to recur; (2) defendant’s mental illness significantly reduced his culpability for

the crime; (3) defendant had an insignificant criminal record; and (4) but for his statutory ineligibility for probation, he would be granted probation.

The prosecutor also submitted a sentencing memorandum. She asserted the upper term for the attempted murder was appropriate, citing three circumstances in aggravation: (1) the victim suffered great bodily injury; (2) defendant used a knife during the commission of the crime; and (3) the victim was vulnerable. She conceded that defendant had admitted wrongdoing at an early stage.

At the sentencing hearing, McLeod addressed the court. He said that due to the injuries suffered in the attack, he was unable to pursue his professional goal of being a counterintelligence agent, a job for which he had trained. McLeod's wife stated the attack had changed their lives forever, and noted her husband would never be able to pursue his dreams. Defendant expressed remorse for his actions, which he characterized as a product of his mental illness.

The court acknowledged defendant's mental illness; however it concluded the crime involved "great callousness and cruelty and viciousness, and under 4.421 of the California Rules of Court that is a very serious [factor in] aggravation." Observing that defendant attacked the victim from behind and without warning, the court found the victim vulnerable, determining that to be a second aggravating factor. The court stated: "I have looked at the background of the defendant. I have looked at the probation officer's report. I see those two aggravating factors are so substantial . . . that this warrants the maximum term allowed by law." It sentenced defendant to 13 years.

Defendant contends the court abused its discretion by imposing the upper term and seeks remand for a new hearing. He does not dispute the court's conclusion that the crime was callous, cruel, and vicious and that the victim was vulnerable. Instead, defendant suggests the assault was "a product of [his] mental illness, an overarching mitigating factor that the trial court misapprehended and failed to address properly." Defendant alleges that by failing to consider the ramifications of his mental illness, the court did not properly consider the offender as well as the offense. Moreover, he urges,

the court erred by finding the jury's sanity verdict relevant to the issue whether his mental illness was a mitigating factor.

Citing *People v. Scott* (1994) 9 Cal.4th 331, 353, the Attorney General contends defendant forfeited his claim by failing to object to the court's imposition of the upper term. We disagree. By filing a sentencing memorandum, defendant clearly set forth his argument that a sentence less than the upper term for attempted murder was appropriate. In imposing the upper term, the court did not consider any factor not discussed by the parties. Thus, no further objection was necessary to preserve the issue for purposes of appeal. (See *People v. Downey* (2000) 82 Cal.App.4th 899, 909, fn. 4.)

A trial court's sentencing decision is subject to review for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) The discretion "must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.' [Citation.]" (*Ibid.*)

The thrust of defendant's argument is that his mental condition mandates a sentence other than the upper term. The problem with his position is that it ignores the circumstances of the offense. The vicious nature of the attack could very well have caused the victim's death but for the assistance of a nurse who fortuitously happened to be present at the bar. The victim's injuries were severe and resulted in the abandonment of his professional goal. In addition, because defendant perpetrated the assault by approaching the victim from behind and striking without warning, the trial court properly determined the victim was vulnerable.

The trial court considered the circumstances of the offense and the offender and concluded the former justified the imposition of the upper term. Although we recognize that reasonable people might disagree with the sentence imposed, an appellate court is not authorized to substitute its judgment for that of the trial court. (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Ibid.*)

As the court's decision to impose the upper term is neither irrational nor arbitrary, reversal is not warranted.

Finally, we address defendant's claim that the court improperly considered the jury's finding at the sanity phase. Even if we assume the court stated an improper reason for its sentencing choice, "a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper. [Citation.]" (*People v. Price* (1991) 1 Cal.4th 324, 492, superseded by statute on other grounds as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1161-1165.) Here, as we have noted, in imposing sentence the trial court found the aggravating circumstances more compelling than defendant's mental condition at the time of the commission of the crime. It is not reasonably probable that the court would have imposed a lesser sentence had it known it was improper to consider the jury's sanity verdict.

DISPOSITION

The judgment is affirmed.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.