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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. SCOTT BRITTON CARLSON, Defendant and Appellant.	2d Crim. No. B287712 (Super. Ct. No. 2014028631) (Ventura County)

Scott Britton Carlson appeals from the judgment entered after his conviction by a jury of assault with a deadly weapon (ADW) in violation of Penal Code section 245, subdivision (a)(1).[1] The jury found true an enhancement that he had personally inflicted great bodily injury (GBI). (§ 12022.7, subd. (a).)[2] The

[1] All statutory references are to the Penal Code.

[2] Section 12022.7, subdivision (a) provides, "Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted

trial court sentenced him to an aggregate term of seven years: the four-year upper term for ADW plus three years for the GBI enhancement.

Appellant contends that the trial court violated the prohibition against dual use of facts at sentencing. (§ 1170, subd. (b).) He maintains that, in deciding to deny probation and impose the upper term for ADW, the court erroneously considered the true finding on the GBI enhancement. We affirm.

Facts

Appellant and his brother, Lance Carlson (Lance), got into an argument. Appellant turned his back toward Lance. When Lance approached him from behind, appellant suddenly turned around and stabbed Lance in the liver with a knife. Appellant said, "'Well, you ain't walkin' too good now, are ya?'" Appellant stabbed Lance again in the ribcage. The blade of the knife broke into two parts.

Lance grabbed appellant's wrists and squeezed them until he heard the knife drop. He "gave [appellant] a glancing blow to his head." Lance then called 911.

After the stabbing, a police officer interviewed appellant. The officer smelled an odor of an alcoholic beverage on appellant's breath.

According to the probation report, "[m]edical staff advised police that [Lance] sustained 'life threatening injuries.'" He had "a lacerated liver" and underwent "'emergency surgery.'"

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felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years."

The Trial Court Properly Relied on the Infliction of GBI as a Reason For Denying Probation

One of the court's reasons for denying probation was that appellant had "inflicted serious physical injury under rule 4.414(a)(4)" of the California Rules of Court.[3] We reject appellant's claim that this constituted an "impermissible dual use of facts." "There is no prohibition on using the same fact to deny probation and enhance punishment. [Citations.]" (*People v. Bowen* (1992) 11 Cal.App.4th 102, 106; see also *People v. Scott* (1994) 9 Cal.4th 331, 350, fn. 12 ["It . . . appears that the same fact may be used both to deny probation and to impose the upper term"]; accord, *People v. Black* (2007) 41 Cal.4th 799, 817.)

The Trial Court Did Not Rely on the Infliction of GBI as a Reason for Imposing the Upper Term for ADW

Section 1170, subdivision (b) provides, "The court shall set forth on the record the reasons for imposing the term selected and 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." Rule 4.420(c) provides, "To comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing a particular term only if the court has discretion to strike the punishment for the enhancement and does so."

The trial court said it had selected the four-year upper term for the ADW because of the following circumstances in aggravation: (1) "the crime involved great violence pursuant to [rule] 4.421(a)(1)," (2) appellant "poses a serious danger to society under [rule] 4.421(b)(1)," and (3) "he was on probation when the crime was committed [under rule] 4.421(b)(4)."

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[3] All citations to rules are to the California Rules of Court.

Rule 4.421(a)(1) provides that circumstances in aggravation include factors relating to the crime, including that "[t]he crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness." Appellant claims that, by considering the "great violence" factor, the trial court violated the prohibition against "using the fact of any enhancement" to impose an upper term. (§ 1170, subd. (b).)

The People argue that the court did not violate the prohibition against dual use of facts at sentencing. The People distinguish between the "great violence" factor of rule 4.421(a)(1) and the infliction of GBI pursuant to section 12022.7, subdivision (a): "While 'great violence' refers to the offender's actions, 'great bodily harm' refers to the results of the actions. . . . The court found that the great violence of appellant's actions, distinct from the great harm caused by appellant's actions, justified the upper term. Hence, the court did not rely on the great bodily injury finding to impose the upper term."

We agree with the People. The infliction of GBI and the use of "great violence" are different concepts. A person can inflict GBI without using great violence, e.g., adding poison to the victim's food or deliberately causing the victim to fall by tripping him. On the other hand, a person can use great violence without inflicting GBI. "Enhancement under Penal Code section 12022.7 punishes the actual infliction of great bodily injury. The focus is on the result of one's assaultive behavior." (*People v. Parrish* (1985) 170 Cal.App.3d 336, 343.) Section 12022.7 "is a legislative attempt to punish more severely those crimes which actually result in great bodily injury. [Citation.]" (*Id*. at p. 344.) In imposing the upper term for ADW, the trial court properly

focused on the "great violence" used by appellant in inflicting GBI, not on the actual infliction of GBI.

People v. Coleman (1989) 48 Cal.3d 112, is distinguishable. There, our Supreme Court noted, "In selecting the upper term [for assault with intent to murder], the trial court cited as aggravation, 'that the crime involved great violence, *great bodily harm*, acts disclosing a high degree of cruelty, viciousness and callousness,' thereby using 'a fact charged and found as an enhancement [i.e., infliction of GBI]' to impose the upper term." (*Id*. at p. 164, italics added.) Unlike the trial court in *Coleman*, the trial court here mentioned only the "great violence" factor in justifying its selection of the upper term. It said nothing about "great bodily harm."

If the Trial Court Had Erred in Relying on the "Great Violence" Factor, Its Error Would Have Been Harmless

"'Improper dual use of the same fact for imposition of both an upper term and a consecutive term or other enhancement does not necessitate resentencing if "[i]t is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error."' [Citation.] Only a single aggravating factor is required to impose the upper term . . . ." (*People v. Osband* (1996) 13 Cal.4th 622, 728-729.)

The trial court recited three aggravating factors. If the court had erroneously relied on the "great violence" factor, its error would have been harmless because it properly relied on the other two factors. One factor was that appellant had been on probation when he committed the ADW. (Rule 4.421(b)(4).) The second factor was that appellant "poses a serious danger to society under [rule] 4.421(b)(1)." The court stated, "I am persuaded that the public safety aspects of this just simply

outweigh . . . the alternative perspective." "I think my duties to the public that I serve compel this result."

The trial court reasonably concluded that appellant "poses a serious danger to society." There was no provocation warranting his use of deadly force. Lance did not threaten or touch appellant. Lance testified: "I just told him to go crawl back into his vodka bottle. 'Why don't you just get out of here first thing in the morning.' Then I started walkin' towards him." Appellant turned around and stabbed Lance in the liver and ribcage.

Appellant appeared to take pleasure in the stabbing. He taunted appellant by saying, "'Well, you ain't walkin' too good now, are ya?'" Although he had grievously injured his brother, he never expressed any remorse.

This was not appellant's first violent incident. In 2009 he was convicted of violating section 417, subdivision (a)(1), which makes it a misdemeanor to "draw[] or exhibit[] any deadly weapon whatsoever, other than a firearm, in a rude, angry, or threatening manner." The probation report does not summarize the facts underlying this offense. At the sentencing hearing, the prosecutor said that appellant had "brandished an ax at a Verizon technician." Appellant did not dispute the prosecutor's version of events.

About a year and half after stabbing his brother, appellant was arrested for a violation of section 422, subdivision (a) - threatening to commit a crime that would result in death or great bodily injury. According to the probation report, appellant "threatened to hit two juvenile victims over the head with their skateboards. When one of the victims stated that if he did so, he would go to jail, [appellant] replied 'no I wouldn't because there

would be no witnesses and you would be dead.'" Appellant told the police "that loud noises (such as skateboarding) cause him 'to go into war mode.'" The police asked if he had any weapons. Appellant "replied, that he did not need weapons as 'this is iron, and this is steel' as he raised his fists in the air." One of the juveniles reported that, a week earlier, appellant had thrown a rock at him. Appellant was convicted of a misdemeanor violation of section 422, subdivision (a), for threatening the two juveniles. One month later, he was arrested for making another criminal threat. This incident resulted in a conviction for disturbing the peace. (§ 415, subd. (2).) These three post arrest offenses show a pattern of dangerousness.

Appellant's trial counsel attributed the stabbing to his client's severe alcoholism. The probation report notes, "[I]t appears [appellant] has made no effort to address his alleged alcohol abuse problem." The report concludes that he "continues to pose a threat to the community, and to his own family."

On this record, it is not reasonably probable that the trial court would have imposed a more favorable sentence in the absence of its consideration of the "great violence" factor. (*People v. Osband*, *supra*, 13 Cal.4th at pp. 728-729.) Thus, if the trial court erred in considering this factor, "[r]esentencing is not required." (*Id.* at p. 729.)

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J. TANGEMAN, J.

David R. Worley, Judge

Superior Court County of Ventura

Jolene Larimore, under appointment by the Court of Appeal for Defendant and Appellant.

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