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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. ROSALYN JONES, Defendant and Appellant.	B286034 (Los Angeles County Super. Ct. No. MA062671)

APPEAL from a judgment of the Superior Court of Los Angeles County. Daviann L. Mitchell, Judge. Affirmed in part, reversed in part, and remanded with directions.

Robert A. Werth, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Michael R. Johnsen, Deputy Attorneys General, for Plaintiff and Respondent.

Rosalyn Jones appeals her sentence after the trial court revoked probation. Jones claims the trial court either abused its discretion in imposing the high term sentence or failed to exercise its discretion at all. Jones also argues the trial court miscalculated her presentence custody credit and potentially imposed certain one-time-only assessments twice. As discussed below, we affirm Jones's sentence, but reverse and remand for further proceedings on the other issues raised on appeal.

BACKGROUND

1. Events Leading to Jones's Arrest and Probation

The events leading to Jones's March 2014 arrest are described in both the reporter's transcript from the preliminary hearing and the probation report. Because Jones argues the trial court abused its discretion in relying on the facts as stated in the probation report, we summarize the relevant facts as stated in both the probation report and the preliminary hearing.

a. Preliminary Hearing

The preliminary hearing was held on May 23, 2014. Deputy Sheriff Brandon Hartshorne was the only witness to testify at the hearing and he described the events that led to Jones's arrest.

Deputy Hartshorne testified that, on the evening of March 6, 2014, he responded to a Walmart parking lot in Lancaster, where he spoke with Joseph Barnett, Jr. Barnett told deputy Hartshorne that Jones was his ex-girlfriend and mother of his two-year-old child. Barnett explained that, earlier in the evening, he and his father were in a car being driven by another person, Ms. Lewis. They were leaving a CVS parking lot also in Lancaster when Jones "rammed her vehicle two times in the back of the vehicle he was in." Barnett told deputy Hartshorne that,

after Jones "rammed" her car into the car he was in, "they drove around Lancaster at a high rate of speed" "being chased by [Jones]." Eventually, Ms. Lewis drove into the Walmart parking lot and parked. Jones stopped her car behind them. Barnett told deputy Hartshorne that, once parked, he got out of the car because he wanted to check on his child, who was in the backseat of Jones's car. When Barnett was out of the car, Jones "struck him with her vehicle."

Deputy Hartshorne also spoke with the two other occupants of the car in which Barnett was riding, Barnett's father and Ms. Lewis, the driver. They both confirmed what Barnett had told the deputy. Deputy Hartshorne testified that Ms. Lewis stated Jones "had rammed — I believe her word was 'rammed,' but hit her vehicle with her vehicle — or [Jones's] vehicle, while she was driving." Ms. Lewis also described the drive from the CVS parking lot to the Walmart parking lot as a " 'high speed chase.' " Deputy Hartshorne testified that, on the night of the incident, he did not see "[a]ny signs of contact" between the vehicles nor did he see any "major damage" to either of the vehicles.

In addition, deputy Hartshorne reviewed video surveillance of the Walmart parking lot from the night of the incident, which confirmed what Barnett had told him. In particular, deputy Hartshorne saw the car in which Barnett was riding enter the Walmart parking lot, with a white minivan following closely behind. He saw Barnett exit the car and approach the minivan, at which time "the white minivan sped up, and struck [Barnett] in the hip, knocking him to the ground."

b. Probation Report

On May 23, 2014, the same day as the preliminary hearing, a probation officer prepared a probation report summarizing the events that had brought Jones before the court (probation report). The probation officer recommended denying probation and sentencing Jones to state prison. The probation report was not filed with the trial court until July 23, 2014, when the trial court granted Jones probation (discussed below).

The probation report explained the events leading to Jones's arrest in much the same way as deputy Hartshorne had at the preliminary hearing. For example, consistent with deputy Hartshorne's testimony, the probation report stated the parties drove "at a high rate of speed" from one parking lot to the next. The probation report also stated Jones used her minivan to "hit the father of her child while he was walking in the parking lot" and "suddenly accelerated and hit the victim, knocking him to the ground."

In some respects, however, the probation report's description of events differed. For example, instead of stating Jones "rammed" her minivan into the car in which the others were riding, the probation report stated Jones "used her car with her 2 year old daughter inside to smash into the victim's car." And while deputy Hartshorne testified Jones "rammed" into the other car two times, the probation report stated Jones "suddenly struck the victim's vehicle with her car six times." And, although the probation report indicated that the people involved in the incident either did not suffer any injuries or suffered no serious injuries, the report stated that the car Ms. Lewis was driving "suffered some damage."

The probation report listed Jones's convictions since 1996, which included seven misdemeanors and one felony. The last noted conviction was a misdemeanor from August 2008.

2. Arrest, Custody, Probation

Jones was arrested at the scene on March 6, 2014, and released on bail three days later.

On May 28, 2014, a few days after the preliminary hearing, an information was filed and charged Jones with four felony counts: three counts of assault with a deadly weapon (i.e., her minivan) in violation of Penal Code, section 245, subdivision (a)(1), and one count of assault by means likely to produce great bodily injury in violation of Penal Code, section 245, subdivision (a)(4).[1] However, Jones failed to appear for her arraignment hearing, and the court issued a bench warrant. Jones was eventually arraigned on June 13, 2014. At that time, Jones entered a not guilty plea and the trial court remanded her to custody.

On July 23, 2014, Jones pled no contest to one count of assault with a deadly weapon. (§ 245, subd. (a)(1).) The trial court suspended sentence, placed Jones on five years of formal probation, and ordered her to serve 120 days in county jail. The court calculated that Jones had already served 89 days in custody. As conditions of her probation, the court ordered Jones, among other things, to make restitution, to obey all laws and orders of the court, to complete a 52-week domestic violence counseling program, to cooperate with probation in a plan for

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[1] The probation report included three additional counts with which Jones was not actually charged.

Subsequent undesignated statutory references are to the Penal Code.

drug treatment and rehabilitation and alcohol counseling, to abide by the terms of the protective order protecting Barnett, and to submit to drug testing. The court also ordered Jones to pay certain assessments and fees, including a $40 court operations assessment and a $30 conviction assessment.

3. Probation Period

Jones struggled to comply with the terms of her probation. In January 2015, the probation officer reported Jones had "failed to comply with her conditions of probation," noting specifically that Jones had been arrested in November 2014 for assaulting two people, had not enrolled in court-ordered programs, and had not made any payments toward her probation financial obligation of $6,135. Later in 2015, the probation officer reported that although Jones had "no new offenses" she had failed to appear at a May 2015 court hearing, still had made no payments toward her probation financial obligation, and had not completed all court-ordered programs. And at a September 2015 hearing discussing Jones's failure to appear in May 2015, the trial court allowed Jones to remain "out O.R." but admonished her that if she did not appear at the next hearing "you're going to get the maximum sentence. I'll tell you that right now." Jones appeared at the next court hearing, as ordered.

By late 2015, Jones had made one $20 payment toward her probation financial obligation, had been reporting regularly to probation, and had completed a drug program. The trial court noted Jones had taken "significant steps in resolving her issues . . . and she'll stay out of custody because of that." At a September 2015 hearing, the court addressed Jones, stating: "Stay on the ball. Looks like you're doing fine. Hang in there, get

all that stuff for me [e.g., progress reports and proof of restitution payments], and I'll get you off probation."

However, Jones failed to appear for a November 2015 court hearing and, by December 2015, had not completed the court-ordered domestic violence program. Nonetheless, Jones remained released on her own recognizance.

In February 2016, Jones admitted she had violated her probation by failing to appear at a number of court hearings and by failing to pay restitution as ordered. The trial court revoked and reinstated Jones's probation. By mid-2016, Jones had made two further payments toward her probation financial obligation. The probation officer reported "[i]t appears that the defendant is making an effort to comply with the court orders."

However, in January 2017, Jones was arrested again, this time for shoplifting and possessing false Department of Motor Vehicle documents. And, in September 2017, the probation officer reported Jones was "not making an effort to cooperate" and had stopped reporting to or communicating with the probation department. Thus, on September 13, 2017, the trial court revoked Jones's probation and remanded her to custody without bail.

4. Sentencing

The probation violation and sentencing hearing was held on October 17, 2017. The trial court found Jones in violation of her probation for failing to report to probation, failing to appear for court hearings, and being charged with new offenses earlier that year.

Before sentencing Jones, the court reviewed Jones's struggles and successes during her more than three years of probation. The trial court noted it had warned Jones in 2015

that, if she missed another court hearing, the court would impose the maximum sentence. And yet when Jones missed another hearing, the court allowed her to stay out of custody. The court also reviewed the probation report and the original allegations. The court stated, "In the original allegations, the defendant was charged with using her car with her two-year-old daughter inside to smash the victim's car and hit the father of her child while he was walking in the parking lot. . . . The defendant suddenly struck the victim's vehicle with her car six times, not once, but six times, as victim Lewis drove the car out of the parking lot. The defendant followed at a high rate of speed." The court also stated that, when Barnett walked past Jones's car in the Walmart parking lot, "defendant suddenly accelerated and hit the victim, knocking him to the ground." In addition, the trial court reviewed Jones's criminal history. The trial court described the case as "extremely egregious under the circumstances. It's not a moment of rage where you punch the side of the car. It's slamming your car, a couple thousand-pound vehicle, into somebody else's vehicle and actually hitting them. In addition to that, you had the two-year-old in the car the entire time."

The trial court revoked Jones's probation and sentenced her to the high term of four years in prison. The court listed the following aggravating factors as support for imposing the high term: (a) "the crime involved great violence and the threat of great bodily harm and other acts disclosing a high degree of cruelty, viciousness, or callousness," (b) "[t]he victim was particularly vulnerable," (c) Jones's conduct indicated she was "a serious danger to society," and (d) Jones's "prior convictions as an adult are numerous and of increasing seriousness." The trial court found no mitigating factors. The court rejected defense

counsel's request to consider the midterm sentence, stating it had considered Jones's earlier admission and opportunity to have probation. The court explained further that it had considered other sentencing options, but decided on the high term because of the "egregious nature of the original charges combined with her complete failure, dating back decades, of her conduct and getting in increasing seriousness — the most egregious is the two-year-old was in the car, and she actually hit the victim with her car. Not just rammed the car, she hit the victim." Toward the close of the hearing, the court noted "I did read and consider all the probation reports and the letters provided by the defendant in making my decisions and the testimony."

The abstract of judgment reflects that the trial court ordered Jones to pay one $40 court operations assessment and one $30 conviction assessment, both of which the court had imposed at the July 23, 2014, hearing.

Jones appealed.

DISCUSSION

1. Jones's Sentence

Jones argues the trial court abused its discretion in two ways. First, Jones claims the trial court incorrectly relied on irrelevant facts, namely, those stated in the probation report. Second, Jones claims the trial court failed to exercise its discretion at all when sentencing Jones because at an earlier hearing in 2015 the court warned it would impose the maximum sentence if Jones failed to appear for another hearing.

Jones forfeited these issues by failing to raise them before the trial court. "[C]omplaints 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."

(*People v. Scott* (1994) 9 Cal.4th 331, 356.) " '[C]laims involving the trial court's failure to properly make or articulate its discretionary sentencing choices' are subject to forfeiture, including 'cases in which the stated reasons allegedly do not apply to the particular case, and cases 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 to give a sufficient number of valid reasons.' ([*Scott*,] at p. 353.) We recently affirmed this rule and do so again." (*People v. Boyce* (2014) 59 Cal.4th 672, 730–731.)

In any event, as explained briefly below, Jones's arguments lack merit.

a. Applicable Law

The choice of the appropriate sentence term rests within the trial court's discretion. (§ 1170, subd. (b).) The trial court can base an upper term sentence " 'upon any aggravating circumstance that the court deems significant, subject to specific prohibitions.' " (*People v. Weber* (2013) 217 Cal.App.4th 1041, 1063.) The articulated reasons must be supported by a preponderance of the evidence in the record and they must reasonably relate to the particular sentencing determination. (*People v. Scott*, *supra*, 9 Cal.4th at pp. 349–350.)

We review the trial court's sentencing decision for an abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) "The trial court's sentencing 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.' " (*Ibid.*) A trial court abuses its discretion "if it relies upon circumstances that are not relevant to the decision or

that otherwise constitute an improper basis for decision. [Citations.] A failure to exercise discretion also may constitute an abuse of discretion." (*Id.* at pp. 847–848.)

"When [the trial] court errs in identifying or articulating its sentencing choices, the reviewing court has no choice but to remand the matter for resentencing unless it finds the error nonprejudicial, i.e., it is 'not reasonably probable that a more favorable sentence would have been imposed in the absence of the error.' " (*People v. Scott*, *supra*, 9 Cal.4th at p. 355.)

b. The trial court did not abuse its discretion.

Jones "concedes the trial court could have imposed an aggravated term if it relied on the testimony given at the preliminary hearing." According to Jones, however, because the trial court relied on the probation report, the court abused its discretion in imposing the high term. But contrary to Jones's position, the probation report does not differ significantly or substantively from the preliminary hearing testimony. Moreover, in addition to the probation report, the trial court stated it also considered the testimony before sentencing Jones. Consequently, we conclude the trial court did not abuse its discretion in sentencing Jones to the high term.

Although the probation report and preliminary hearing testimony describe the events of March 6, 2014, using different terms, the substance is the same. For example, while the probation report states Jones used her minivan to "smash" into the other car and that Jones "suddenly struck the victim's vehicle," deputy Hartshorne testified at the preliminary hearing that Jones used her minivan to "ram" into the other car. For present purposes, we discern no substantive difference between Jones using her minivan to smash, ram, or strike the other car.

And we find no record support for Jones's repeated assertion on appeal that she only "tapped" the other car with her minivan. Similarly, we find no substantive difference between the probation report's description that Jones "suddenly accelerated and hit [Barnett], knocking him to the ground" and deputy Hartshorne's testimony that Jones "sped up, and struck [Barnett] in the hip, knocking him to the ground" and that Jones "struck [Barnett] with her vehicle."

However, there is one factual difference between the probation report and the preliminary hearing. Specifically, the probation report states Jones used her minivan to hit the other car six times, while deputy Hartshorne testified Jones hit the other car only twice. As Jones points out, the trial court emphasized the probation report's description of six hits when discussing Jones's behavior. It appears, however, that the court's emphasis was on the fact that Jones hit the car more than once, which was true. In any event, the trial court stated it had considered both the probation report and the testimony before sentencing Jones. Whether Jones hit the car twice or six times, and given the existence of multiple other aggravating factors, we conclude the trial court did not abuse its discretion in relying on the probation report's description that Jones used her minivan to hit the other car six times.

In light of the facts as described in either the probation report or by deputy Hartshorne at the preliminary hearing, we disagree with both Jones's characterization of the March 6, 2014, events as not involving a threat of great bodily injury as well as her position that the victim Barnett was not particularly vulnerable. By using her minivan both to smash, ram, or strike another vehicle and to hit and knock over an unprotected person

(whether that person was injured or not), Jones unquestionably threatened great bodily harm and Barnett was particularly vulnerable when purposely hit by Jones's minivan.

Finally, we do not agree with Jones's interpretation of the trial court's 2015 warning to her. Jones claims that, because in September 2015 the trial court threatened to impose the maximum sentence if she failed to appear for her next hearing, the court necessarily failed to exercise any discretion at the final sentencing hearing held more than two years later in October 2017. This position is belied by the trial court's actions following its 2015 admonition. For example, when Jones in fact did miss a subsequent hearing, the trial court did not revoke her probation and impose the maximum sentence as it had warned it would do. Rather, at that hearing and over the next two years, the trial court both noted the progress Jones was making (albeit at times Jones took some steps backward) and encouraged her to continue making progress. The record does not support Jones's position that the trial court made any knee-jerk decisions, whether before sentencing or at sentencing. Indeed, at the sentencing hearing, the trial court stated it had considered sentencing options other than the high term sentence it eventually imposed.

Accordingly, we cannot accept Jones's argument either that the trial court relied on incorrect information in making its sentencing decision or that the court failed to exercise its discretion at all. We conclude a preponderance of the evidence supports the trial court's reasons for imposing the high term sentence, the trial court exercised its discretion, and the trial court did not abuse that discretion.

In light of our conclusions, Jones's ineffective assistance of counsel argument necessarily fails as well.

2. Custody Credit

Jones also argues the trial court miscalculated her presentence custody credit. The Attorney General agrees, although for different reasons. In addition to agreeing an error or errors were made, the parties correctly agree the record is insufficient to calculate the custody credit correctly on appeal. Accordingly, we reverse the custody credit award and remand so that the trial court can make a record and recalculate Jones's presentence custody credit.

3. Assessments

Finally, Jones claims that, although it is unclear, the trial court may have improperly imposed the $40 court operations assessment and the $30 criminal conviction assessment twice. Although the Attorney General agrees those assessments should be imposed only once, the Attorney General does not believe that the trial court imposed them more than once.

A $40 court operations assessment and a $30 criminal conviction assessment are to be imposed once, upon conviction of a criminal offense. (§ 1465.8; Gov. Code, § 70373.) As Jones points out, the court imposed both assessments in July 2014 when Jones entered her plea and the court granted probation. Subsequently, at the October 2017 hearing, when probation was revoked and the trial court sentenced Jones to prison, the court stated Jones was required to pay both assessments. The abstract of judgment lists both assessments only once. To the extent the trial court ordered Jones to pay the $40 court operations assessment and the $30 criminal conviction assessment twice, such an order would be incorrect. On remand, we direct the trial court to clarify that each of those assessments is imposed once.

DISPOSITION

The custody credit award is reversed. The matter is remanded, and the trial court is directed to recalculate Jones's presentence custody credit. The trial court also is directed to clarify that the $40 court operations assessment (§ 1465.8) and the $30 criminal conviction assessment (Gov. Code, § 70373) are each imposed only once. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.