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

THE PEOPLE,

Plaintiff and Respondent,

v.

THAIBRIZ GARNER,

Defendant and Appellant.

B269067

(Los Angeles County  
Super. Ct. No. TA137376)

APPEAL from a judgment of the Superior Court of  
Los Angeles County. Allen J. Webster, Jr., Judge. Affirmed as  
modified.

Janet Gusdorff, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief  
Assistant Attorney General, Lance E. Winters, Assistant Attorney  
General, Susan Sullivan Pithey, and Heather B. Arambarri, Deputy  
Attorneys General, for Plaintiff and Respondent.

Appellant Thaibriz Garner challenges his conviction for criminal threats. While at the transitional home where he resided, Garner pulled a knife from a drawer in the kitchen and threatened to stab the manager of the home. He contends that the trial court erred by failing to request a mental examination to determine whether he was fit to stand trial. He also raises sentencing issues. We affirm, subject to a correction in Garner's presentence credits.

### **FACTS AND PROCEEDINGS BELOW**

Garner was a resident at One Way Transitional Housing, which provides housing in Compton for the physically and mentally disabled. On June 4, 2015, Calvin P., the manager of One Way, heard a scream from a female resident, and ran inside to find Garner "busying himself with something" in front of another resident in the living room of the house. Calvin P. did not clearly see what Garner was doing. Sheriff's deputies arrived on the scene and arrested Garner. When one deputy asked Garner why he had exposed himself, he replied, "It's just tendencies. I can't help myself."

The following day, Garner returned to One Way and went to the bedroom of the woman who had screamed at him the day before. He stood over the woman, who was lying in bed, took his penis out of his pants, and appeared to be masturbating. Calvin P. asked Garner what he was doing, but Garner did not respond. Calvin P. threatened to call the police, and Garner told him he was not going anywhere. Garner then went to the kitchen and pulled a knife from a drawer.

Calvin P. entered the kitchen, and he and Garner exchanged heated words. Garner said, "I'll fuck you up," while walking toward Calvin P. and making a jabbing motion with the knife. Calvin P. testified that he was "[a]fraid for [his] life." Calvin P. managed to convince Garner, who was still holding the knife, to come outside

with him. He led Garner out the back door of the house, then came back inside and locked the door so that Garner could not return.

An information charged Garner with (count 1) making criminal threats, in violation of Penal Code<sup>1</sup> section 422, subdivision (a), and (count 2) indecent exposure, in violation of Penal Code section 314, subdivision (1). The information alleged that count 1 was a serious felony because Garner personally used a deadly weapon in the commission of it. (§§ 1192.7, subd. (c)(23), 12022, subd. (b)(1).) It also alleged that Garner had suffered a prior conviction for second degree burglary (§ 459), and had served a prior prison term pursuant to section 667.5, subdivision (b).

At the conclusion of the prosecution's case, the trial court granted Garner's motion to dismiss count 2 for insufficient evidence.<sup>2</sup> (§ 1118.1.) The jury found Garner guilty of count 1 and found true the allegation that he used a knife in the commission of the offense. The trial court granted Garner's motion to dismiss the allegation of a prior prison term for lack of evidence.

The court sentenced Garner to a total term of four years in prison. The sentence consisted of the upper term of three years for criminal threats, plus a consecutive one-year term for using the knife in the commission of the offense.

## **DISCUSSION**

Garner contends that the trial court violated his Fifth and Fourteenth Amendment rights to due process by failing to request sua sponte a mental examination to determine if he was competent

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<sup>1</sup> Unless otherwise specified, subsequent statutory references are to the Penal Code.

<sup>2</sup> Count 2 charged Garner with indecent exposure only with respect to the incident that took place on June 4, and no one testified to seeing Garner expose himself on that occasion.

to stand trial. He also contends that the trial court abused its discretion by choosing the upper term of three years for his sentence while relying on aggravating factors that were either factually or legally inapplicable to his case. Finally, he contends that the trial court miscalculated the credits to which he was entitled. We affirm the judgment, subject to a modification to correct Garner's presentence credits.

I. *Mental Competency to Stand Trial*

Garner contends that the trial court erred by failing to request a mental examination of him when there was substantial evidence to call into question his mental competence to stand trial. Neither Garner nor his attorney requested an examination of his mental competence to stand trial, but this is not necessary to preserve the issue on appeal. (*Pate v. Robinson* (1966) 383 U.S. 375, 384 (*Pate*)). When the court proceeds with a trial in spite of substantial evidence calling into question a defendant's mental competence to stand trial, it acts in excess of its jurisdiction, and reversal is required regardless of any showing of prejudice. (*People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 69-70.)

A. *Relevant Proceedings*

Garner points to numerous examples of strange behavior that, he argues, called into question his mental competence to stand trial. Throughout most of the proceedings, Garner did not speak and kept his head down. In pretrial settlement negotiations, the court noted that "there's really no communication from Mr. Garner." During trial, when the court asked Garner if he waived his right to testify on his own behalf, he nodded his head in the affirmative but did not speak, and he did not respond at all when the court asked him if he waived trial on the priors. During closing arguments, Garner appeared to be sleeping and loudly snoring. At the sentencing

hearing, Garner jumped up and attempted to run out of the courtroom.

Garner's attorney and the probation officer assigned to the case both requested that the court order Garner to be placed temporarily in a mental diagnostic facility, pursuant to section 1203.03, subdivision (a). Calvin P. told the probation officer that Garner had displayed behavior he felt was indicative of mental illness, including by exposing himself. Garner's attorney also noted that Garner was housed in a jail facility for impaired persons. In a diagnostic study produced pursuant to the court's order under section 1203.3, a prison psychologist concluded that "Garner appears to be suitable for psychiatric hospitalization due to his mental illness."<sup>3</sup> The psychologist stated, however, that Garner "did not demonstrate delusional thought processes," and that he was "alert, and aware of his surroundings."

Garner's attorney stated that he believed his client was competent to stand trial, despite his strange behavior.

#### B. *Discussion*

"A defendant is mentally incompetent [to stand trial] if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (§ 1367, subd. (a).) The Penal Code sets forth procedures by which a court may inquire into a defendant's mental competence. Section 1368 provides that, "[i]f, during the pendency of an action and prior to judgment, . . . a doubt arises in the mind of the judge as to the mental competence of the defendant, he or she shall state that doubt in the record and inquire of the attorney for the defendant

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<sup>3</sup> Garner filed a motion to augment the record on appeal with the psychologist's report. That motion is granted.

whether, in the opinion of the attorney, the defendant is mentally competent.” (*Id.*, subd. (a).)

In *Pate, supra*, 383 U.S. at pages 385-386, the United States Supreme Court held that when a defendant produces evidence calling into question his mental competence to stand trial, due process requires the trial court to hold a hearing to determine whether he is fit to stand trial. Although the Penal Code directs the court to hold a hearing if “a doubt arises in the mind of the judge” (§ 1368, subd. (a)), our Supreme Court has held that the trial court must hold a hearing if a defendant presents substantial evidence of mental incompetence, regardless of whether other evidence exists to the contrary, or whether the judge personally has a doubt as to the defendant’s sanity. (*People v. Pennington* (1967) 66 Cal.2d 508, 518-519 (*Pennington*).) In this context, “[e]vidence is ‘substantial’ if it raises a reasonable doubt about the defendant’s competence to stand trial.” (*People v. Jones* (1991) 53 Cal.3d 1115, 1152.)

We disagree with Garner’s contention that there was substantial evidence to call into question his mental competence. The test of mental competence to stand trial is whether a defendant has a “ ‘ ‘sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and . . . a rational as well as a factual understanding of the proceedings against him.’ ” (*People v. Rogers* (2006) 39 Cal.4th 826, 846–847 (*Rogers*).) Garner behaved oddly both in committing the offense for which he was convicted and at trial, and he may have suffered from a mental illness, but nothing in the record suggests that he was incapable of understanding the proceedings and assisting counsel.

Although evidence of mental illness may be relevant to competency to stand trial, “to be entitled to a competency hearing, ‘a defendant must exhibit more than . . . a preexisting psychiatric

condition that has little bearing on the question . . . whether the defendant can assist his defense counsel.” (*Rogers, supra*, 39 Cal.4th at p. 847.) Here, unlike in many cases in which courts overturned convictions because of questions of the defendant’s mental competence (e.g., *People v. Stankewitz* (1982) 32 Cal.3d 80, 92; *Pennington, supra*, 66 Cal.2d at p. 519; *People v. Melissakis* (1976) 56 Cal.App.3d 52, 61), there was no expert testimony or psychological study calling into question Garner’s ability to stand trial. Indeed, the psychologist who evaluated Garner concluded that Garner was not delusional, and that he was “alert, and aware of his surroundings.”

Garner’s silence at trial does not necessarily indicate that he was unable to assist his attorney. Nor is bizarre behavior alone sufficient to raise a question as to a defendant’s ability to take part in his trial. (*People v. Medina* (1995) 11 Cal.4th 694, 735.) In at least two instances, Garner indicated that he was aware of and capable of taking part in the proceedings. He nodded his head in response to the trial court’s question whether he wished to waive his right to testify in his own defense. In addition, in a pretrial hearing, after Garner’s attorney informed the court that he had offered the district attorney a settlement under which Garner would serve a sentence of six months, Garner chimed in, “Due to the fact that I didn’t have a knife.” This showed that Garner was interested in the state of the case and knew what evidence would be relevant.

Garner argues that his case is similar to *Maxwell v. Roe* (9th Cir. 2010) 606 F.3d 561 (*Maxwell*), in which the Ninth Circuit granted the defendant’s petition for a writ of habeas corpus because the trial court had failed to hold a competency hearing in spite of substantial evidence of his incompetence to stand trial. (*Id.* at pp. 576-577.) But in *Maxwell*, as in other cases where an appellate court overturned a defendant’s conviction as a result of

doubts as to the defendant's mental competence, the evidence of incompetence to stand trial was much stronger than it is here. In *Maxwell*, the defendant was physically absent from court during trial when he was placed on a 14-day psychiatric hold. (*Id.* at p. 574.) He “mumbled and shouted obscenities during the pre-trial conference, he had to be physically restrained by his own counsel, he requested that his counsel be fired, his communication with his counsel was so strained that defense counsel stated that he was unable to develop a theory of the case or prepare an opening statement, and [he] asked that his attorney hand over evidence helpful to the prosecution.” (*Id.* at p. 575.) Nothing about Garner's conduct at trial approached the level seen in *Maxwell*.

Because there was no substantial evidence calling into question Garner's fitness to stand trial, the trial court did not abuse its discretion by declining to hold a mental competency hearing.

## II. *Choice of Upper Term for Sentence*

Garner contends that the trial court abused its discretion by sentencing him to the upper term of three years on his conviction for criminal threats. (§ 422, subd. (a).) He argues that three of the aggravating factors that the court relied on in choosing the upper term were either factually inaccurate or legally improper to apply. We agree, but we conclude that remanding the case for resentencing is not required because there is no reasonable probability that Garner would receive a reduced sentence upon remand.

When imposing sentence for a crime subject to determinate sentencing, the trial court has the discretion to select the lower, middle, or upper term. (§ 1170, subd. (a)(3).) In choosing among these terms, “[t]he court shall state the reasons for its sentence choice on the record at the time of sentencing” (§ 1170, subd. (c)), but the court is “not . . . required to cite ‘facts’ that support its decision or to weigh aggravating and mitigating circumstances.”



(*People v. Sandoval* (2007) 41 Cal.4th 825, 847 (*Sandoval*).) A single aggravating factor may be sufficient to support an upper term sentence. (*People v. Weber* (2013) 217 Cal.App.4th 1041, 1064.)

Rule 4.421 of the California Rules of Court sets out a number of different aggravating factors the trial court may rely on in imposing sentence. Among these factors are the fact that the crime involved the threat of great bodily harm (Cal. Rules of Court, rule 4.421(a)(1)), that the defendant was armed (*id.*, rule 4.421(a)(2)), that the victim was particularly vulnerable (*id.*, rule 4.421(a)(3)), that the defendant has engaged in violent conduct that indicates a serious danger to society (*id.*, rule 4.421(b)(1)), and that the defendant had a long history of criminal conduct (*id.*, rule 4.421(b)(2)). The court may also rely on “additional criteria reasonably related to the decision being made,” so long as the “additional criteria [are] stated on the record by the sentencing judge.” (*Id.*, rule 4.408(a).) The court may not use “a fact charged and found as an enhancement . . . as a reason for imposing the upper term” unless the court strikes the punishment for the enhancement. (*Id.*, rule 4.420(c).) Nor may the court use a “fact that is an element of the crime upon which punishment is being imposed” as a reason for choosing the upper term. (*Id.*, rule 4.420(d).)

We review the trial court’s sentencing decision for abuse of discretion. (*Sandoval, supra*, 41 Cal.4th at p. 847.) 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.” (*Ibid.*) Even if the trial court errs in imposing sentence, we need not remand the case for “‘resentencing if “[i]t is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error.” ’” (*People v. Osband* (1996) 13 Cal.4th 622, 728.)

In this case, the trial court found several different aggravating factors supporting the imposition of the upper term. Garner contends that the court erred with respect to three of these factors, and we agree.

First, the court stated that there was an aggravating factor in that, “[p]ursuant to the California Rules of Court[, rule] 4.421(a)(1)[,] the crime involved the threat of great bodily harm and other acts.” But the offense of criminal threats requires by definition that the defendant threaten “to commit a crime which will result in death or great bodily injury to another person.” (§ 422, subd. (a).) The trial court thus erred by using as an aggravating factor a “fact that is an element of the crime upon which punishment is being imposed.” (Cal. Rules of Court, rule 4.420(d).)

Next, the court erred by relying as an aggravating factor on the fact that “defendant was armed with use of the weapon at the time of the commission of the crime.” Although the trial court may in general rely on the fact that the defendant was armed or used a weapon at the time of the crime as an aggravating circumstance (see Cal. Rules of Court, rule 4.421(a)(2)), in this case the court imposed a one-year enhancement to Garner’s sentence pursuant to section 12022, subdivision (b)(1), for using a deadly weapon. Because the court imposed sentence for the weapon enhancement, it could not rely on the same fact as an aggravating factor in choosing the upper term. (See Cal. Rules of Court, rule 4.420(c).)

Finally, the court cited the fact that “the victim was particularly vulnerable” as a reason for choosing the upper term. This is a proper aggravating factor (see Cal. Rules of Court, rule 4.421(a)(3)), but in this case, the trial court provided no valid explanation as to why the victim was particularly vulnerable. The court stated as follows: “[T]he day before [he threatened Calvin P.,] Mr. Garner [was] alleged to have committed indecent exposure in

violation of Penal Code [section] 314 against a particular resident. She was unavailable to come to court as a witness. . . . [The next day,] he went to the location, the boarding home where he was staying and attempted to threaten [Calvin P.] with the knife. Seems to the court the victim was particularly vulnerable that day as well.” To the extent the court relied on the vulnerability of the female resident to whom Garner allegedly exposed himself, this was improper, as she was not a victim of criminal threats, the only crime for which Garner was convicted. To the extent the court relied on the vulnerability of Calvin P., this was improper because the sole stated basis for concluding that Calvin P. was vulnerable was that Garner threatened him with a knife. As is explained above, because the court imposed a one-year enhancement for the use of the weapon, it could not rely on that same fact as a reason for imposing the upper term. (Cal. Rules of Court, rule 4.420(c).)

In spite of these errors, we do not remand the case for resentencing because there is no reasonable probability “ “that a more favorable sentence would have been imposed in the absence of the error[s].” ’ ” (*People v. Osband*, *supra*, 13 Cal.4th at p. 728.) In addition to the improper aggravating factors described above, the court also relied on other proper aggravating factors. The court stated, “according to [California Rules of Court, r]ule 4.421(b)(1)[,] Mr. Garner has engaged in violent conduct that indicates serious danger to society. Pursuant to [California Rules of Court], rule . . . 4.421(b)(2) his prior conviction as an adult [and] sustained juvenile delinquency proceedings are numerous.” The court detailed a long list of offenses dating back to 1995 and continuing up to his recent post-conviction time in prison for a diagnostics study, during the course of which “[i]n less than a month . . . , he committed 2 violations, one indecent exposure and 2 of resisting arrest.” The court concluded that Garner’s “particular conduct in court, out of

court, in jail, shows a total disregard for the rights of others and respect for the system.”

The record shows that the trial court placed far more emphasis on the proper aggravating factors, especially Garner’s long criminal history, than on the improper factors. Ultimately, the court concluded that “the [factors] of aggravation clearly, clearly, clearly outweigh those of mitigation.” If this court were to remand the case for resentencing without taking into account the improper factors of aggravation, there is no reasonable probability that the court would impose a lesser sentence.

### III. *Calculation of Credits*

Garner contends that the trial court miscalculated his presentence conduct credits. We agree.

The trial court awarded Garner 225 days of credit prior to sentencing, consisting of 196 days of actual time served, plus 29 additional days of conduct credit. That award would have been correct if Garner had been guilty of a violent felony listed in section 667.5, subdivision (c). In such a case, a defendant may earn conduct credit totaling no more than 15 percent of his actual time served. (§ 2933.1, subd. (a).) But because Garner’s conviction for criminal threats is not one of the offenses listed in section 667.5, subdivision (c), that limitation does not apply. Instead, Garner was entitled to earn two days of conduct credit for each two days he spent in jail prior to sentencing. (§ 4019.) Consequently, Garner was entitled to 392 days of presentence credits, consisting of 196 days of actual time served and 196 days of conduct credits.

The judgment shall be modified to reflect this award.

## **DISPOSITION**

The trial court is ordered to amend the abstract of judgment to reflect 392 total presentence custody credits, and to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.