Filed 9/9/19 P. v. Bloss CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ERIC BLOSS, Defendant and Appellant.	B289616 (Los Angeles County Super. Ct. No. BA461550)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ray G. Jurado, Judge. Affirmed.

Katja M. Grosch, 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 Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted appellant Eric Bloss of one count of assaulting his mother with a stun gun. Appellant claims the trial court abused its discretion in sentencing him to three years in county jail rather than probation with mental health treatment. We find no error and affirm.

PROCEDURAL HISTORY

On January 2, 2018, the Los Angeles County District Attorney ("the People") filed an information charging appellant with one count of assault with a stun gun or taser (Pen. Code, § 244.5, subd. (b)).[1] Prior to trial, the People offered appellant a plea deal of three years formal felony probation, with one year of outpatient mental health counseling. Appellant declined the offer. Subsequently, the trial court told appellant it would extend the same offer, and if appellant successfully completed one year of probation and the mental health treatment, the court would reduce the charge to a misdemeanor. Appellant would then complete the remaining two years of misdemeanor probation. Appellant declined the offer. The court cautioned appellant that the offer was "now off the table. If you get convicted, you are not gonna get that."

The jury found appellant guilty. The court sentenced appellant to the upper term of three years in county jail. Appellant timely appealed.

---

[1]All further statutory references herein are to the Penal Code unless otherwise indicated.

FACTUAL BACKGROUND

The following evidence was adduced at trial.

A. *Prosecution evidence*

Wendy Wong, appellant's mother, testified that appellant moved in with her in July 2017. At the time, Wong was having her house remodeled and staged for sale. On the morning of September 30, 2017, she went into the upstairs bedroom where appellant kept his belongings. Appellant was sleeping downstairs on the living room sofa. Wong cleaned up appellant's belongings that were strewn about the room. Then she left to attend a yoga class.

Returning home, Wong discovered that appellant had not cleaned up after himself. She felt frustrated that appellant often failed to put things away and left the house in disarray. When she went upstairs, appellant was in his bedroom and the items she had put away that morning were "all over." She told appellant that he needed to put his things away because she was holding an open house later that day. Appellant said he would do it later. Wong left the room but returned about 10 to 15 minutes later to ask again. Appellant again responded that he would clean up "later."

When Wong returned to his room a third time, appellant still had not cleaned anything, so Wong put some of his papers in a box and said she was going to put the box in his car. She also might have said she was going to disconnect the internet. Appellant did not respond. Wong denied touching or trying to attack appellant. As she walked with the box toward the stairs, she heard a sound behind her and then felt a "sharp pain on my back." She screamed and felt a second hit and another sharp pain in the same spot. She tried to run and fell down the stairs.

After she fell, she was afraid that appellant might come after her, so she ran out of the house and drove away. She drove for a few minutes, then pulled over and called 911.

The prosecution introduced the 911 call at trial. During the call, Wong reported that "my son just used a taser gun and tased me twice." She declined an ambulance, stating that she was "okay, it just hurt at the time."

Wong waited in her car until police officers arrived. She did not know what had hit her, but an officer told her it was a stun gun, based on the burn marks on her back. She accompanied the police into the house and found an empty box for a stun gun in the bedroom closet. A few months later, she found the stun gun in the yard as she was clearing leaves.

Wong testified that appellant is six inches taller than she is and about 60 to 80 pounds heavier. At the time of the incident, Wong was 61 years old and appellant was 25.

Responding officer Alberto Argumaniz testified that he and his partner took appellant into custody at the residence. Appellant was wearing a black stun gun holster at the time.

B. *Defense evidence*

Appellant testified that he was in his room working on his computer the morning of the incident. His mother came into the room and was "very angry" that the kitchen was messy. She asked him to clean up and he told her that he would but was in the middle of a "huge deadline." According to appellant, Wong screamed at him and called him a "piece of shit." She also threatened to disconnect the internet, which would interrupt his internet business. Appellant said that he tried to "defuse the situation" by calmly telling Wong he was happy to help, but was working on a deadline. Wong continued to yell at him in a

threatening and aggressive manner. She then elbowed appellant in the face and pushed him off the chair.

According to appellant, Wong then picked up a box containing his currency collection valued at over $5,000, as well as other valuable documents. She yelled that she was taking it and left the room. Appellant testified that he yelled at his mother to stop and tried to grab the box. She "knocked me back" and he was "in a state of panic and was very scared for my life." Appellant stated that he "had no time to think" and felt he had "no choice" but to use the stun gun. He used it to stop Wong "from the violence against me and the threat to my property." Appellant testified that he did not want to hurt Wong, but was afraid she might hurt him. He claimed he only fired the stun gun once.

Appellant identified the stun gun as his; he testified that he kept it for safety, as he had been assaulted and threatened in the past.

Appellant stated that after he hit Wong with the stun gun, he grabbed his box and ran back into his room; he was not sure whether Wong fell down the stairs. After Wong left the house, appellant was scared and threw the stun gun off the second-floor balcony. It fell to the street and broke. Appellant retrieved it from the street and then left it in the yard.

The defense introduced video footage from the police officer's body camera recorded during appellant's arrest. In the footage, an officer asked appellant what was going on, and appellant responded, "It was a really distressing situation. My mom . . . started assaulting me and robbing. . . . I had to defend myself." He also stated that Wong started "grabbing" and "attacking" him.

Appellant also testified that Wong physically harmed him many times in the past. Specifically, he recalled an incident in 2009 when Wong grabbed him and threw him on the bed. He also discussed an incident in 2012 when Wong splashed water on his computer and threw the cup at his head. Finally, he testified that in July 2017, Wong complained that he was not driving well and slapped him in the face.

Appellant admitted that he pled no contest to a prior charge of stalking in June 2017 and was placed on probation.

DISCUSSION

Appellant asserts that the trial court abused its discretion in sentencing him to three years in jail, rather than probation. We disagree.

A. *Background*

In advance of sentencing, both parties submitted sentencing memoranda addressing appellant's prior misdemeanor convictions. In May 2017, appellant was convicted of stalking an ex-girlfriend (§ 646.9, subdivision (a)). According to the prosecution sentencing memorandum, appellant "followed his ex-girlfriend around, lit a firework near her ear, chased her to her boyfriend's house, and made her fearful." The conviction resulted in a protective order against appellant and three years' probation. Also in 2017, appellant was convicted of vandalism (§ 594, subd. (a)), theft (§ 484), carrying a loaded firearm in public (§ 25850, subd. (a), and tampering with a vehicle (Veh. Code, § 10852), arising out of an incident with a former supervisor. After appellant was fired from his job at a fast food restaurant, he poured sugar into the gas tank of his supervisor's car and then waited outside the parking garage. Police found appellant outside the garage with two loaded firearms, ammunition, and a

pair of gloves. Police also found additional firearms and ammunition in appellant's car parked nearby. In addition, appellant left handwritten and typed documents stating his plan to give certain people the "death penalty" and listing his ex-girlfriend and her new boyfriend, among others, as well as a recorded "goodbye" statement.

Wong also submitted a victim impact statement detailing appellant's troubled relationship with his parents. Wong stated that she was afraid of appellant and worried that he would get out of jail, find her, and kill her. She also stated that his mental illness made him a "danger to himself and others."

At the sentencing hearing, the court indicated it had read and considered the probation report, the sentencing memoranda from both parties, the statement from Wong, and a letter submitted by appellant's uncle. Addressing Wong, the court noted her letter "made it clear that you are afraid of your son, and I think you have every reason to be, unfortunately." The court continued that its "hands are tied in a certain way" because appellant's crime was punishable only by county jail time, which would likely result in appellant serving a smaller fraction of his sentence than he would in state prison. The court explained that "after having heard and listened to the trial, reviewed Mr. Bloss's criminal history, after having listened and watched him testify, I have an overwhelming concern that he is a danger to the public. If I could, I would sentence him to more than the three years, but the law handcuffs me." The court also noted that there were mental health treatment services available in the county jail and "I hope that Mr. Bloss is able to take advantage of that," but the court could not order such treatment in jail.

Defense counsel argued that the high term was not warranted, given that appellant had no prior felony convictions. She also noted that appellant had previously spent time in mental health facility and that the prosecution had made a pre-trial offer of time served plus probation. She requested probation to allow appellant to seek further mental health treatment. The prosecutor responded that the prior offer was irrelevant and that appellant's behavior was escalating.

The court stated that it had considered the following factors in aggravation: (1) "the crime involved the threat of great bodily injury and a high degree of callousness, given that the defendant tased his own mother twice as she walked toward a staircase, causing her to fall or slip down the stairs"; (2) appellant used a weapon; (3) the victim was vulnerable, given her age, relative size compared to appellant, and position at the top of the stairs; (4) appellant "has engaged in violent conduct, which indicates a serious danger to society"; (5) appellant's prior convictions were of increasing seriousness; (6) appellant was on probation at the time of the offense; and (7) his prior performance on probation was unsatisfactory. The court found no factors in mitigation. Based on these findings, the court sentenced appellant to the upper term of three years in county jail. The court also entered a ten year stay-away protective order regarding Wong.

B. *Analysis*

Appellant argues that the court misunderstood the scope of its discretion and believed it was required to sentence appellant to jail time rather than probation. Appellant cites to the court's statement that its "hands are tied" in support of this assertion.

The record does not support appellant's argument. In context, the court's statement during sentencing conveyed to the

victim, appellant's mother, the court's concern that appellant would serve a small fraction of his three-year sentence due to overcrowding in county jail. Despite this concern, the court stated it was unable to impose a longer sentence or require appellant to serve his time in state prison, where he would likely serve a larger portion of the sentence. Nothing in the record supports appellant's argument that the court would have sentenced him to probation but believed it lacked the discretion to do so. Indeed, the court stated that if it could, it would sentence appellant to more than three years. In addition, the court rejected defense counsel's request for probation, making it clear that it felt appellant deserved the maximum sentence and was a danger to others.

The court also stated that its hands were tied because it could not order appellant to undergo mental health treatment in jail, despite seeming agreement from all parties that appellant would benefit from such treatment. That statement does not reflect a lack of understanding about the scope of the court's discretion. As the court noted, appellant would have mental health services available to him in jail, should he choose to seek out such treatment.

Appellant also argues that the court abused its discretion by imposing the maximum sentence after trial, when previously it had offered a plea deal of probation, essentially penalizing appellant for exercising his right to trial. He cites no authority in support of this argument. Moreover, he does not dispute the facts underlying his prior convictions, but suggests that the lack of any prior felony convictions or felony probation should have entitled him to a felony probation sentence in this case. This argument lacks merit.

"Probation is generally reserved for convicted criminals whose conditional release into society poses minimal risk to public safety and promotes rehabilitation. (§§ 1191.1, 1202.7.)" (*People v. Welch* (1993) 5 Cal.4th 228, 233.) A sentencing court "has broad discretion to determine whether an eligible defendant is suitable for probation." (*Ibid.*; § 1203.1.) We find an abuse of that discretion where the sentencing court's determination is arbitrary or capricious or "'exceeds the bounds of reason, all of the circumstances being considered.'" (*People v. Welch*, *supra*, at p. 234; see also *People v. Nuno* (2018) 26 Cal.App.5th 43, 49 ["the defendant bears the burden on appeal to show that the denial of probation was, under the circumstances, arbitrary, capricious, or exceeding the bounds of reason."].)

In exercising its discretion in selecting a term of imprisonment, "the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision." (Cal. Rules of Court, Rule 4.420(b).) Circumstances in aggravation include factors relating to the crime and factors relating to the defendant. (Cal. Rules of Court, Rule 4.421.) Here, the court set forth on the record its finding of a number of these circumstances, including that the crime involved the threat of great bodily injury and a high degree of callousness, the crime involved use of a weapon, the victim was vulnerable, appellant's conduct indicated a serious danger to society, and he was on probation at the time of the offense. The court further found no circumstances in mitigation. The record amply supports these findings. As such, it was not an abuse of discretion for the court to impose the upper term. (*People v.*

Black (2007) 41 Cal.4th 799, 813 [a single aggravating circumstance will support an upper term sentence].)[2]

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, ACTING P.J.

CURREY, J.

[2]Because we find no error, we need not reach appellant's argument that the court's error also violated his due process rights.