

9/13/17 P. v. Olmedo CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

RAUL OLMEDO,

Defendant and Appellant.

B277521

(Los Angeles County  
Super. Ct. No. NA103306)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark C. Kim, Judge. Affirmed.

Meredith J. Watts, 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, Senior Assistant Attorney General, Stephanie C. Brennan, Supervising Deputy Attorney General, Abtin Amir, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant Raul Olmedo of felony assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)).<sup>1</sup> The trial court denied probation and sentenced defendant to the middle term of three years in state prison. On appeal defendant contends the trial court abused its discretion in declining to reduce the offense to a misdemeanor or grant probation. We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

In the middle of the afternoon on January 4, 2016, Perla Perez was unlocking her bicycle from a sidewalk rack when defendant, whom she did not know, ran up with a beer can in his hand. He said the bicycle belonged to him and angrily started to pull it away from her. Christine Diaz, a passenger in a nearby car, saw two people she did not know struggling over the bicycle and dialed 911.

Perez was gaining control of the bicycle when defendant pulled a knife from his pocket. He was about three feet from her and made a “stabbing motion” in her direction. Perez was afraid and released the bicycle.

Defendant rode off. When he had ridden about 30 feet, Perez gave chase on foot, loudly yelling, “That’s my bike, that’s my bike.” She dialed 911 as she ran. The encounter began at the intersection of Cherry Avenue and Anaheim Street, and several bystanders joined the chase.

No trial witness saw defendant fall off the bicycle; but after a short distance, he, the knife, and the bicycle were all on the ground. Diaz stepped out of her car and kicked defendant’s knife out of his reach.

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<sup>1</sup> All statutory references are to the Penal Code.

When Long Beach Police Department Officer Harrison Moore arrived, defendant and the knife were still on the sidewalk. Perez identified the knife as the one defendant used to menace her.

Perez had owned the bike for a few weeks before the incident. There was nothing distinctive about it. The encounter left her afraid to ride her bicycle at night.

In lieu of presenting the testimony of Long Beach Police Department Officer Alexandra Romero in court, the parties stipulated as follows: Defendant told Officer Romero he had never seen Perez before that day and could not describe the bicycle, but he thought it was his and pulled out his knife when she would not give it to him. Officer Romero could smell the odor of alcohol on defendant's breath; but when she asked, defendant denied he had been drinking.

Trial began on a single count information alleging second degree robbery with use of a deadly weapon. At the close of the prosecution case, after the trial court denied defendant's section 118.1 motion, the prosecution amended the information to add count 2, assault with a deadly weapon. The jury convicted defendant on count 2 and acquitted him of the robbery charge.

At sentencing, defendant urged the trial court to exercise its discretion and reduce the conviction to a misdemeanor or sentence him to probation on the felony conviction. Defendant supported his argument with a written sentencing memorandum and a neuropsychologist's report.

The neuropsychologist interviewed defendant before the sentencing hearing. Defendant told him he graduated from high school and attended some college. He was married, but

separated. Testing revealed defendant's "general cognitive ability . . . [was] in the extremely low range . . . [h]owever [defendant's] adaptive functioning is significantly higher in some areas arguing against the diagnosis of an intellectual disability." Defense counsel noted defendant had no previous convictions and argued defendant should be given the opportunity to rehabilitate while on probation rather than be sent to prison where "because of his developmental disability, he [would] be at a significant disadvantage . . . ."

The prosecution also filed a sentencing memorandum, urging imposition of the three-year middle term prison sentence. The prosecutor argued defendant's use of a knife "in a manner that nearly harmed someone and could have killed her" rendered defendant not suitable for probation. Before trial, when defendant was out of custody, he missed two court proceedings and returned to court only after a bench warrant issued.

The trial court denied defendant's request to reduce his conviction to a misdemeanor and denied probation: "Based upon the circumstances in which the alleged incident took place, the jury rejected the robbery because of the defendant's mental condition and the circumstances in which the incident happened, but there is a balancing test, one of which is to protect the community. [¶] Clearly, the defendant used a knife. The victim was attacked with a knife. And he is not suitable for probation at this time."

The trial court sentenced defendant to the middle term of three years in state prison. Defendant timely appealed.

## DISCUSSION

Section 245, subdivision (a)(1) is a wobbler offense, and a trial court has broad discretion to punish it as either a felony or a misdemeanor. (§ 17, subd. (b); *People v. Park* (2013) 56 Cal.4th 782, 789; *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 974.) In determining whether to reduce the crime to a misdemeanor, “[t]he facts and circumstances of the offense remain a relevant consideration.” (*People v. Tran* (2015) 242 Cal.App.4th 877, 892.)

In reviewing the trial court’s decision not to reduce a felony conviction, we do “not disturb the court’s decision on appeal unless the party attacking the decision clearly shows the decision was irrational or arbitrary. (*Ibid.*) Absent such a showing, we presume the court acted to achieve legitimate sentencing objectives.” (*People v. Sy* (2014) 223 Cal.App.4th 44, 66.) Additionally, we do not reverse “‘merely because reasonable people might disagree. ‘An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.’” (*People v. Superior Court (Alvarez)*, *supra*, 14 Cal.4th at p. 978.)

The trial court articulated its consideration of the facts of the offense—defendant’s use of a knife—and pertinent circumstances, including defendant’s mental abilities and community safety. There was no abuse of discretion in refusing to reduce defendant’s conviction to a misdemeanor.

Nor do we find an abuse of discretion in the trial court’s denial of probation. Defendant’s conviction of assault with a deadly weapon rendered him ineligible for probation “[e]xcept in unusual cases where the interests of justice would best be served if the person [were] granted probation . . . .” (§ 1203, subd. (e)(2);

see *People v. Bradley* (2012) 208 Cal.App.4th 64, 89.) California Rules of Court, rule 4.413(b) provides that the trial court “should apply the criteria in [rule 4.413](c) to evaluate whether the statutory limitation on probation is overcome . . . .”

One criterion is whether defendant’s use of a knife was “substantially less serious than the circumstances typically present in other cases involving the same probation limitation *and* the defendant has no recent record of committing similar crimes or crimes of violence.” (Cal. Rules of Court, rule 4.413(c)(1)(A), *italics added*.) Another is whether “[t]he crime was committed because of a mental condition not amounting to a defense, and there is a high likelihood that the defendant would respond favorably to mental health care and treatment that would be required as a condition of probation.” (Cal. Rules of Court, rule 4.413(c)(2)(B).)

The trial court’s implicit finding that neither factor applied here was well within its discretion. The knife assault on Perez was unprovoked and occurred in the afternoon on a public sidewalk with numerous bystanders. While alcohol may have contributed to defendant’s conduct, there was no evidence he committed an assault with a deadly weapon because of a mental condition. Moreover, the neuropsychologist reported defendant denied being mental ill or on any medications and stated if medications were prescribed “while awaiting trial,” he would not take them. There was no evidence of any likelihood “defendant would respond favorably to mental health care and treatment.” (Cal. Rules of Court, rule 4.413(c)(2)(B).)

**DISPOSITION**

The judgment is affirmed.

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DUNNING, J.\*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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\* Judge of the Orange Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.