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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ELEMETRIUS SHERON OWENS, Defendant and Appellant.	2d Crim. No. B233264 (Super. Ct. No. F441703) (San Luis Obispo County)

Elemetrius Sheron Owens appeals the judgment entered after a jury convicted him of possession of a firearm near a school (Pen. Code,[1] § 626.9, subd. (b)), possession of a firearm by a felon (former § 12021, subd. (a)(1), now § 29800), having a concealed firearm on his person (former § 12025, subd. (a)(2), now § 25400, subd. (c)(2)), and unlawful possession of ammunition (former § 12316, subd. (b)(1), now § 30305). Appellant contends the court erred in sentencing him to the upper term of five years in state prison. We affirm.

STATEMENT OF FACTS

At approximately 12:30 p.m. on December 15, 2009, Roger Casanova was in the parking lot of Grover Beach Elementary School when he saw appellant come out of a gate to a nearby apartment complex. As appellant walked along the fence to the

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

corner of the apartment complex, Casanova saw the butt of a handgun sticking out of the pocket of the black parka appellant was wearing. Appellant removed the handgun from his pocket and held it pointed to the ground while he looked up and down the street. After appellant returned to the apartment complex, Casanova drove around the neighborhood looking for a police officer and called 911.

When the police responded to the scene, Casanova gave them a description of appellant and directed them to the apartment complex he had entered. The officers went to the complex and approached an apartment door that was slightly ajar. Appellant yelled from inside, "Don't shoot." The officers ordered appellant to come out with his hands up, and he complied. After appellant was handcuffed and detained, he denied that he had a gun and stated that no one else was in the apartment. During a protective sweep of the apartment, the police found a black parka lying on the sofa.

During an in-field showup, Casanova identified appellant as the man he had seen with the gun. Casanova also identified the black parka, and subsequently identified appellant at the preliminary hearing and trial. In executing a search warrant for appellant's apartment, the police found a loaded .38-caliber handgun in a dresser drawer along with a wallet containing appellant's driver's license.

At trial, it was established that the back gate to appellant's apartment was 66 feet away from Grover Beach Elementary School's parking lot and 162 feet from the school cafeteria. The school principal testified that approximately 100 students were coming and going between classes around the time appellant was seen with the handgun.

Appellant's wife, Dazz Rodriguez, testified in his defense. Rodriguez testified that the handgun belonged to her father, who was supposed to pick it up the day appellant was arrested. The day before appellant's arrest, Rodriguez had removed the gun from a storage unit to which only she and her father had access. The gun, which was given to Rodriguez's parents by an elderly neighbor they had cared for, had been in the storage unit since Rodriguez's parents moved to Texas in 2008. Rodriguez also claimed that appellant had been working out of town during the three years preceding his arrest

and only stayed at the apartment on weekends. According to Rodriguez, appellant had just returned to the apartment on the morning of the day he was arrested.

Appellant testified that he had only been home for about two hours when the police arrested him. He admitted that he was wearing the black parka earlier that day, but denied having the gun. He told the police that an elderly man had given him the loaded gun. Appellant knew the gun was in his apartment, but he had never held it and was planning to give it to his father. He knew he was prohibited from possessing firearms due to his 1999 felony conviction for conspiracy to transport controlled substances. He did not know that his wife had put his wallet in the drawer with the gun.

On rebuttal, the police detective who spoke to appellant after he was detained testified that appellant told him he owned a .38-caliber handgun because he used to sell crack cocaine and needed it for protection. When the detective spoke to Rodriguez on the telephone after appellant's arrest, she said that appellant owned a gun and that it was in the top dresser drawer in their bedroom. Neither Rodriguez nor appellant, whom the detective later interviewed at the police station, told the police that the gun had just been taken out of storage or that appellant had just arrived at the apartment that morning.

DISCUSSION

The trial court sentenced appellant to the five-year upper term after finding three factors in aggravation, i.e., that appellant suborned perjury (Cal. Rules of Court,[2] rule 4.421(a)(6)); has numerous prior convictions (rule 4.421(b)(2)); and has served a prior prison term (rule 4.421(b)(3)). The court also found as a mitigating factor that appellant's prior performance on parole was satisfactory (rule 4.423(b)(6)). Appellant contends the court's sentencing decision amounts to an abuse of discretion because the evidence is insufficient to support its finding that appellant suborned his wife's perjury.[3]

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[2] All further citations to a rule are to the California Rules of Court.

[3] Appellant also argues that the court could not rely on a finding that he suborned perjury because that fact was not found true by the jury as contemplated in *Cunningham v. California* (2007) 549 U.S. 270. He acknowledges that we must reject this claim based

Appellant also faults the court for relying on the finding that he had served a prior prison term because the fact that he was a convicted felon was an element of the crime for which he was sentenced.

The People respond that appellant has forfeited the right to bring these claims by failing to raise them below, and that the claims in any event lack merit. For the first time in his reply brief, appellant urges us to overlook the forfeiture on the ground that his trial attorney's failure to challenge his sentence on the grounds asserted on appeal amounts to ineffective assistance of counsel.

We agree that the claims are forfeited. It is settled that "complaints 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.) Appellant's claim that his trial attorney provided ineffective assistance by failing to raise the claims below is similarly forfeited due to the fact that it was asserted for the first time in the reply brief. (*People v. Smithey* (1999) 20 Cal.4th 936, 1017, fn. 26.) In any event, the claim fails on the merits because appellant cannot demonstrate a reasonable probability that the result of the proceedings would have been different if trial counsel had raised the claims below, i.e., that the court would have sentenced him to a lesser term. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.)

Sentencing decisions are reviewed for abuse of discretion. (*People v. Sandoval, supra*, 41 Cal.4th at p. 847.) Defendants bear a heavy burden when attempting to show an abuse of discretion. (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.) "'In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.]" (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.) Even if we might have ruled differently in the first instance, we will affirm the trial court's ruling as long as the record

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on controlling authority (*People v. Sandoval* (2007) 41 Cal.4th 825, 843-848), and merely raises it in order to preserve his right to seek further review.

shows the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law. (*People v. Carmony* (2004) 33 Cal.4th 367, 378.)

A trial court may impose the upper term when it determines that the circumstances in aggravation outweigh the circumstances in mitigation. (Rule 4.420(b).) Factors in aggravation and mitigation need only be established by a preponderance of the evidence. (*People v. Steele* (2000) 83 Cal.App.4th 212, 225.) Moreover, a single aggravating circumstance is sufficient to make a defendant eligible for an upper term and for the trial court to impose an upper term sentence. (*People v. Black* (2007) 41 Cal.4th 799, 813, 815.)

In sentencing appellant to the upper term, the court relied in part on the fact that appellant's prior convictions were numerous. (Rule 4.421(b)(2).) Appellant does not dispute this finding, nor does he claim the court was prohibited from treating it as an aggravating factor for purposes of sentencing. This finding was sufficient by itself to support the court's imposition of the upper term. (*People v. Black, supra*, 41 Cal.4th at pp. 813, 815.) Appellant also fails to show a reasonable probability that the court would have declined to impose the upper term absent the additional factors in aggravation.

Appellant also fails to demonstrate that the court abused its discretion in finding as a factor in aggravation that appellant had suborned perjury, as contemplated in rule 4.421(a)(6). A person is guilty of suborning perjury if he or she "willfully procures another person to commit perjury." (§ 127.) "The elements of the crime of subornation of perjury consist of: a corrupt agreement to testify falsely [citation]; proof that perjury has in fact been committed [citation]; the statements of the perjurer were material [citations]; and evidence that such statements were willfully made with knowledge as to the falsity thereof. [Citation.] Moreover, one who procures another to commit perjury must know that the perjurer's statements are false. [Citations.]" (*People v. Jones* (1967) 254 Cal.App.2d 200, 217.)

Substantial evidence supports the court's finding that appellant had suborned the perjury of his wife, Dazz Rodriguez. In making that finding, the court stated, "I did not believe his wife's testimony and, obviously, the jury didn't believe it

either, that this gun was going to be a gift to her father, that it had been in a storage facility and had just been taken out of there." The court went on to note other examples of appellant "lying to promote his position that this was just a mistake." Given the relationship between appellant and his wife and the similarities between their testimony, the court could reasonably find that they had agreed she would testify falsely.

Appellant fares no better in attempting to undermine the court's sentencing decision on the ground that it impermissibly relied on his prior service of a prison term as a factor in aggravation. According to appellant, the court erred in relying on the fact that he had served a prior prison term as contemplated in rule 4.421(b)(3), because his status as a convicted felon was an element of the crime for which he was sentenced to the upper term. Although the People concede the point, we do not accept the concession.

Appellant was sentenced to the upper term for possession of a firearm near a school, in violation of section 626.9, subdivision (b). The statute provides in pertinent part that the crime is punishable by imprisonment for two, three, or five years where "the person previously has been convicted of any felony . . . ." (§ 626.9, subd. (f)(2)(A)(i).) In deciding to impose the upper term, the court did not rely on the fact that appellant had previously been convicted of a felony, but rather that he had served a prior prison term. Because the fact that appellant had served a prior prison term was not an element of the crime for which appellant was sentenced, the court was not prohibited from relying on that fact in deciding to impose the upper term. (See rule 4.420(d) ["A fact that is an element of the crime upon which punishment is being imposed may not be used to impose a greater term"].) In any event, it cannot be said that the court's decision to impose the upper term was contingent on its finding that appellant had served a prior prison term. Improper dual use of the same fact in this context does not require resentencing where "' . . . "[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.) As we have already noted, appellant has failed to show a reasonable probability that the court would have imposed a lesser sentence upon a finding of only

one factor in aggravation, much less two. Accordingly, his claim of ineffective assistance of counsel fails. (*Strickland v. Washington, supra*, 466 U.S. at p. 687.)

The judgment is affirmed.

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PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Teresa Estrada-Mullaney, Judge

Superior Court County of San Luis Obispo

Gerald Peters, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, David E. Madeo, Deputy Attorney General, for Plaintiff and Respondent.