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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. BRANDON GREGORY WEST, Defendant and Appellant.	B280169 (Los Angeles County Super. Ct. No. TA119796)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura R. Walton, Judge. Affirmed.

Tyrone A. Sandoval, 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, Kenneth C. Byrne, Paul S. Thies and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Brandon Gregory West pled no contest to assault and was sentenced to probation. Probation was revoked after he committed a second assault, and the court sentenced defendant to the high term of four years. Defendant argues on appeal that the trial court improperly based its sentencing decision on the facts of the second assault, rather than on the first assault. Defendant forfeited this argument by failing to object to the sentence below. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

At the preliminary hearing, A.W.[1] testified that she had been in a relationship with defendant for about three months. On June 3, 2011, A.W. and defendant got into an argument, and defendant hit her on the mouth with his arm and watch. The blow cracked A.W.'s tooth, split her lip, and broke defendant's watch. A.W. testified that she fell to the floor, and defendant "hit me in the back of the head" with a closed fist five or six times, "until my right ear drum busted." Her hearing was affected for three to four weeks. A.W. also said she needed ongoing dental care to address her broken tooth.

The Los Angeles County District Attorney (the People) charged defendant with one count of felony assault (Pen. Code, § 245, subd. (a)(1)[2]), and alleged that in the commission of the offense, defendant inflicted great bodily injury under

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[1] We refer to the victims by their initials to protect their privacy. (See Cal. Rules of Court, rule 8.90(b)(4).)

[2] At the time the information was filed, Penal Code section 245, subdivision (a)(1) stated, "Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely

circumstances involving domestic violence. (§ 12022.7, subd. (e).) Defendant pled not guilty.

Defendant filed a motion under section 995 asserting that there was insufficient evidence to support the allegation that the offense involved great bodily injury under section 12022.7, subdivision (e). On March 22, 2012, defendant changed his plea to no contest to a violation of section 245, subdivision (a)(1) pursuant to a plea agreement. Thereafter, the People submitted on defendant's section 995 motion, and the court granted that motion. The court sentenced defendant to five years formal probation on the condition that he serve 180 days in jail and attend domestic violence classes.

On March 20, 2014, the court set a probation violation hearing. On April 16, 2014, the court found that defendant was in violation of his probation based on a conviction in another case; the record does not reveal the offense. The court revoked and reinstated probation.

On July 6, 2016, the court set another probation violation hearing. At the hearing on September 7, 2016, D.T. testified that on February 15, 2016 she was at home in Riverside with defendant and their 2-year-old child. Defendant did not live there, but he had been staying there for about a week. D.T. asked defendant to leave, he refused, and they got into an argument. D.T. testified that they were sitting on a bed in the child's room, and defendant "just socked me in my head." D.T.

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to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment." All further statutory references are to the Penal Code unless otherwise indicated.

covered her face with her hands, and defendant got on top of her and hit her four or five more times. D.T. eventually was able to push defendant off by kicking him in his leg, which had previously been injured. D.T. got a knife from the kitchen to protect herself, and called 911. Defendant went outside and smashed the rear window of D.T.'s car with his crutches. As a result of being hit in the face, D.T. had what she described as a "permanent knot" on her face, which was visible on her forehead and never subsided.

Riverside police officer Jeffrey Derouin testified that he responded to D.T.'s 911 call. When he arrived at the home, D.T. surrendered the knife she was holding. D.T.'s injuries were initially "barely visible," but as they talked a lump on her forehead began to swell. D.T. did not appear to have additional injuries. Derouin testified that defendant admitted that he broke the window of D.T.'s car.

Defendant testified that on the day of the incident, D.T. came home from work angry. Defendant's explanation for D.T.'s anger shifted over the course of his testimony. He first said that D.T. was angry because she lost her job, then said she was jealous because she found another woman's information on defendant's phone, and finally said she was mad that defendant wanted to leave because she wanted him to stay. Defendant said that D.T., angry and wielding a knife, came into the upstairs bedroom where defendant was lying down and demanded that defendant get out of her house. Defendant's leg was injured, and he had a cage structure over it with pins in his leg. Defendant picked up one of his crutches, and D.T. wrestled it away from him. Defendant said he did not strike D.T., and he was not aggressive toward her because he was immobilized from the

injury. Defendant admitted that he broke the car window, however, explaining that they went outside and D.T. was advancing toward him with the knife, so he threatened that if she came any closer he would break the window. Defendant testified that he has bipolar disorder and depression. He testified that D.T. lies and is delusional.

Defense counsel argued that based on defendant's admission about the window, "technically he is in violation" of probation. But due to defendant's depression and bipolar disorder, "I don't think prison is what my client needs." Defense counsel asked that defendant be placed in a treatment program instead.

The prosecutor asked the court to impose the upper term of four years. He noted that the original offense was domestic violence against a girlfriend, and the violation offense markedly similar. The prosecutor argued that because defendant's conduct showed that he had not learned that his original offense was wrong, prison was appropriate.

The court stated, "The court finds the defendant is in violation of his probation based on the testimony that I heard here in court. What is particularly concerning is that he was already on probation for an incident with a different female victim, and then this incident occurs." The court said it was hard to credit defendant's testimony that D.T. was the aggressor, given that defendant broke the car window and D.T. called 911. The court said that a treatment program would not be appropriate, because defendant refused to admit that he had a problem with anger or aggression. The court continued, "So based on that, the defendant is found in violation of his probation, and the court is going to order that he serve, based on the violation and the type

of violation that it is," because the incident with D.T. occurred "while he's on probation for a physical attack of another victim where she was injured with a chipped tooth and a bloody lip. So the court finds that he has violated his probation by repeating the exact same conduct for which he was on probation to begin with. So with that being said, the defendant is sentenced to 4 years in state prison."

Defense counsel did not object at any time to the imposition of the high term, before or after the court announced the sentence. After announcing the sentence, the court considered defendant's custody credits and issued a protective order for D.T. The hearing concluded, and defendant timely appealed.

DISCUSSION

On appeal, defendant contends that the trial court erred because it "based its choice of an upper term sentence exclusively on facts that occurred after the grant of probation." He argues that the court violated California Rules of Court, rule 4.435(b)(1), which states that when probation is revoked and a sentence is imposed, "[t]he length of the sentence must be based on circumstances existing at the time probation was granted, and subsequent events may not be considered in selecting the base term."

The Attorney General asserts that defendant forfeited this argument by failing to object in 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 (*Scott*).) "[T]he waiver doctrine [applies] to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices. Included in this category are

cases in which the stated reasons allegedly do not apply to the particular case." (*Id.* at p. 353.)

The waiver doctrine squarely applies here. Defendant contends that the trial court erred because in "discussing its reasoning in selecting the upper term, the court discussed the facts of the incident involving Turner." Defendant's argument, therefore, is that "the stated reasons" for the court's choice of the upper term "allegedly do not apply to [this] particular case." Defendant did not object to the court's stated reasoning when the court imposed the upper term. The waiver doctrine therefore directly encompasses defendant's arguments.

Defendant recognizes that sentencing errors must be preserved by objection, and acknowledges that he did not object below. But he contends that the waiver doctrine articulated in *Scott* does not apply because the error here is "an obvious legal error that is correctable without . . . referring to factual findings in the record." Defendant cites *People v. Smith* (2001) 24 Cal.4th 849 (*Smith*), in which the court noted that there was a narrow exception to the waiver rule for "unauthorized sentences" or sentences entered in excess of the court's jurisdiction. (*Id.* at p. 852.) "[A] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case." (*Scott, supra*, 9 Cal.4th at p. 354.) This exception applies in cases where "the errors presented 'pure questions of law' [citation], and were "'clear and correctable" independent of any factual issues presented by the record at sentencing.' [Citation.] In other words, obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings are not waivable." (*Smith, supra*, 24 Cal.4th at p. 852.)

Here, however, the sentence was not unauthorized. "If the court has suspended imposition of sentence and later revokes the defendant's probation, then the court has undisputed authority to choose from all the initially available sentencing options. (§ 1203.2, subd. (c).)" (*People v. Howard* (1997) 16 Cal.4th 1081, 1084.) The sentence the court imposed—four years—was the statutory upper term for the offense,[3] it was requested by the prosecution, and it was within the court's discretion to impose that term. (§ 1170, subd. (b) ["When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court."].) Arguments that the "court exercised its otherwise lawful authority in an erroneous manner under the particular facts" do not fall within the exception to the waiver rule. (*People v. Welch* (1993) 5 Cal.4th 228, 236.)

Defendant argues that the court did not properly consider the facts of the assault involving A.W. when imposing the sentence. In other words, defendant asserts that his otherwise legal sentence was applied in a factually flawed manner. However, "claims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner." (*Scott, supra*, 9 Cal.4th at p. 354; see also *People v. Boyce* (2014) 59 Cal.4th 672, 730-731 [complaints about the manner in which the trial court exercises its sentencing discretion or a court's "failure to properly make . . . discretionary sentencing choices" cannot be raised for the first time on appeal].) The exception to the waiver doctrine therefore does not apply here.

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[3] *Ante*, fn. 2.

Moreover, the alleged error cannot be corrected without referring to factual findings in the record or remanding for further findings. As the court explained in *Smith, supra*, 24 Cal.4th 849, an error in a discretionary sentencing choice is "not correctable without considering factual issues presented by the record or remanding for additional findings." (*Smith*, *supra*, 24 Cal.4th at p. 853.) Where the question on appeal does *not* involve a discretionary sentencing choice, on the other hand, and instead "presents a pure question of law with only *one* answer," the waiver doctrine does not apply because "any such error is obvious and correctable without reference to any factual issues in the record or remanding for further findings." (*Ibid*.) Here, however, the question is whether the court abused its discretion by the manner in which it imposed a discretionary sentencing choice. This is not an error that may be corrected without reference to any factual issues in the record (i.e., the bases for imposing the upper term) or without remanding for further findings relating to that discretionary sentencing choice. Therefore, it is not within "the narrow class of sentencing errors exempt from the waiver rule." (*Ibid*.)

The Attorney General also asserts that even if defendant had not forfeited his argument, he has failed to demonstrate that reversal is warranted. "A trial court's decision to impose a particular sentence is reviewed for abuse of discretion and will not be disturbed on appeal 'unless its decision is so irrational or arbitrary that no reasonable person could agree with it.'" (*People v. Jones* (2009) 178 Cal.App.4th 853, 860.) Moreover, "'[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] 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.'" (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

Although the court discussed the incident involving D.T. shortly before sentencing defendant, it is clear that the court also considered the facts of defendant's original offense. The court mentioned that A.W. "was injured with a chipped tooth and a bloody lip," and noted that defendant "violated his probation by repeating the exact same conduct for which he was on probation to begin with."[4] "When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper." (*People v. Price* (1991) 1 Cal.4th 324, 492.)

Here, defendant has not demonstrated that it was reasonably probable that the trial court would have chosen a lesser sentence based on the facts of the assault on A.W. alone. Defendant and A.W. were in a relationship, and in the course of an argument, defendant hit A.W. with his arm and watch so hard that he broke both the watch and A.W.'s tooth. After A.W. fell to the ground as a result of the blow, defendant continued punching her in the head so hard that he caused internal damage to A.W.'s ear that affected her hearing for weeks. "[A] single factor in aggravation is all that is needed to impose the upper term." (*People v. Williams* (1996) 46 Cal.App.4th 1767, 1782-1783.) The

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[4] This statement contradicts defendant's assertion that the trial court based its sentencing decision "solely" and "entirely" on the incident involving D.T.

court could have determined that the offense was committed with a high degree of callousness (Cal. Rules of Court, rule 4.421(a)(1)), or that defendant abused a position of trust because he and A.W. were in a relationship (*id*., rule 4.421(a)(11)), or that A.W. was particularly vulnerable. (*Id*., rule 4.421(a)(3).) Any one of these factors would be sufficient to support the court's decision to impose the high term.

Thus, there was sufficient information in the record to warrant imposition of the upper term for defendant's offense. Defendant has not demonstrated that the court's selection of the upper term for his assault of A.W. was an abuse of discretion warranting reversal.

DISPOSITION

Affirmed.

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COLLINS, J.

I concur:

WILLHITE, J.

EPSTEIN, P.J., Dissenting.

I respectfully dissent.

As noted by my colleagues, California Rules of Court, rule 4.435(b)(1) requires trial courts not to consider postprobation facts when sentencing a defendant after a probation violation. This rule was added after the California Supreme Court's decision in *In re Rodriguez*, which held that, under both the federal and state constitutions, a sentence "must reflect the circumstances existing at the time of the offense." (*In re Rodriguez* (1975) 14 Cal.3d 639, 652, superseded by statute on other grounds as stated in *People v. Jefferson* (1999) 21 Cal.4th 86, 94; see also Judicial Council of Cal., Advisory Com. com. to Cal. Rules of Court, rule 4.435(b)(1).) Where "it is readily apparent that the court's selection of the upper term . . . [is] based upon its consideration of [the defendant's] subsequent conduct" and where the "record does not indicate that at the time probation was originally granted the trial court made any findings which could then have justified imposition of the upper term," the trial court has erred. (*People v. Colley* (1980) 113 Cal.App.3d 870, 873.) Such an error occurred in this case.

In this case, the trial court stated that it was imposing a prison sentence "based on the [probation] violation and the type of violation that it is." The court discussed the details of the postprobation violation at length, obliquely referring to the original offense only to criticize appellant for "repeating the exact same conduct." The court's discussion of the postprobation offense was connected to its sentencing decision by a series of sentences beginning with the word "so." In this context, that term "so" means "thus," "therefore," or "consequently." (Webster's 10th New Collegiate Dict. (1989) p.1113, col. 2

["so . . . THUS . . . THEREFORE, CONSEQUENTLY"].) The court's repetition of the word "so" indicates that the court was referring to its discussion of appellant's postprobation offense. The court followed its lengthy discussion of appellant's postprobation offense by saying, "[s]o with that being said, the defendant is sentenced to 4 years in state prison." The only reasonable interpretation of this language is that the court based its selection of the high term entirely on the seriousness of the probation violation.

The court also made no other factual finding justifying imposition of the high term. My colleagues suggest facts upon which the trial court *could have* properly based its decision to impose the high term, but do not show that those reasons actually influenced the court's decision. As they note, deference is required where the trial court has "given" both proper and improper reasons. (*People v. Price* (1991) 1 Cal.4th 324, 492.) This does not mean that deference is required where both proper and improper reasons merely exist. (*People v. Colley*, *supra*, 113 Cal.App.3d at p. 873 [failure to *make* proper findings, coupled with improper consideration of postprobation facts, is error].)

My colleagues find that appellant's right to challenge the court's error has been forfeited due to his failure to object in the trial court. In general, sentencing errors must be preserved for review by objection. (*People v. Scott* (1994) 9 Cal.4th 331, 356 (*Scott*), superseded by statute as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157.) But there is an exception to this rule where the trial court commits an "obvious legal error[]." (*People v. Smith* (2001) 24 Cal.4th 849, 852 (*Smith*); see also *In re Sheena K.* (2007) 40 Cal.4th 875, 882 [review is not limited to

“‘“unauthorized sentences”’” but may be extended to other sentencing issues turning on “‘pure questions of law”’].)

My colleagues characterize the court’s error in this case as factual. It is clear from the record that the trial court’s misunderstanding was regarding the law rather than the facts. The court would not have opined so extensively regarding the postprobation violation at sentencing, while failing to analyze the facts of the original offense, had it been aware of the requirements of California Rules of Court, rule 4.435(b)(1).

Even assuming that the error was a factual one, appellate courts have the discretion to review sentencing errors which have been forfeited. (*Smith*, *supra*, 24 Cal.4th at p. 854 (conc. op. of Mosk, J.) [“forfeiture does not *prohibit* an appellate court from reaching a nonpreserved claim, but merely *allows* it *not* to do so”], citing *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.) Because the prohibition on consideration of facts unrelated to the offense for which a defendant has been convicted is one implicating constitutional rights, exercise of this discretion would be appropriate in this case. (*In re Rodriguez*, *supra*, 14 Cal.3d at pp. 652-653.)

Because this sentencing decision was an issue within the trial court’s discretion, the error cannot be corrected without remand. (*Scott*, *supra*, 9 Cal.4th at p. 355; see also *People v. Edwards* (2011) 195 Cal.App.4th 1051, 1060 [“[i]f correction of a sentencing error may affect the trial court's discretionary decisions in determining an appropriate sentence, the remedy is to reverse and remand for resentencing”].) The majority opinion quotes *Smith*, which states that “obvious legal errors at sentencing that are correctable without . . . remanding for further findings are not waivable,” to imply that issues requiring remand

are by definition forfeited if raised for the first time on appeal. (*Smith*, *supra*, 24 Cal.4th at p. 852.) But this quoted language does not necessarily imply its converse, i.e. that obvious legal errors *not* correctable without remand are *always* forfeited. The general desirability of limiting remand expressed in *Smith* cannot be interpreted so broadly. Many sentencing cases involving clear legal error have necessitated remand for correction by a trial court. (See, e.g., *People v. Edwards*, *supra*, 195 Cal.App.4th at p. 1061.) As the Supreme Court stated in *Scott*, "[w]hen [the trial] court errs in identifying or articulating its sentencing choices, *the reviewing court has no choice but to remand the matter for resentencing*." (*Scott*, *supra*, 9 Cal.4th at p. 355, italics added.)

Remand is appropriate only where appellant was prejudiced by the court's error. (*Scott*, *supra*, 9 Cal.4th at p. 355.) Here, appellant was clearly prejudiced by the trial court's consideration of his probation violation in deciding which punishment to impose. The court's language indicates that it found the high term warranted based on his *repetition* of the same behavior. We cannot know what the trial court would have decided had it considered only the seriousness of the original offense. The majority opinion argues the original offense was severe enough to warrant imposition of the high term, and hence appellant could not have been prejudiced by the court's error. This is exactly the kind of appellate consideration of underlying facts that the forfeiture doctrine is designed to prevent. (See *Smith*, *supra*, 24 Cal.4th at pp. 852-853.) Whether or not the original offense was severe enough to warrant the high term is not for this court to consider. As the Supreme Court found in *Scott*, in cases where the trial court errs in making sentencing

decisions which otherwise fall within its sound discretion, the only remedy is remand. (*Scott*, *supra*, 9 Cal.4th at p. 355.)

I do not suggest that the high term would be unjustified in imposing the high term on the facts of the crime which led to the original disposition. But the trial court was required to make a determination based on that crime, and not events that occurred after the order imposing probation. The record refutes the inference that it did so.

EPSTEIN, P.J.