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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. ARTHUR VINCENT ORTEGA, Defendant and Appellant.	B231182 (Los Angeles County Super. Ct. No. KA086121)

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

Law Office of Christopher Nalls and Christopher Nalls, 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, Assistant Attorney General, Linda C. Johnson and Scott A. Taryle, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Appellant Arthur Vincent Ortega appeals from the judgment of conviction following a jury trial. The jury acquitted him of murder and found him guilty of involuntary manslaughter (Pen. Code, § 192, subd. (b)).[1] The jury also found true the allegation that he used a deadly weapon, a knife (§ 12022, subd. (b)(1)). The trial court sentenced appellant to five years in state prison, based on the upper term of four years, plus one year for the deadly weapon enhancement. Appellant received 1,089 days of presentence credit, based on 727 actual days in custody plus 362 days of conduct credit.

Appellant contends the trial court relied on improper factors in sentencing him to the upper term of four years for involuntary manslaughter. Because we find the trial court relied on at least one valid factor, we affirm the judgment.

FACTS

Prosecution Case

On the night of February 25, 2009, appellant went out drinking with his good friend Carlos Gallardo (age 26), whom he had known since elementary school. Around noon the next day, Gallardo's mother called his cell phone and he told her, "I'm coming, Mom." He did not sound drunk, mention anything out of the ordinary, or say that he was with appellant.

About 12:45 p.m., Michael Rodriguez, a resident of Baldwin Park, saw a red Kia with its right wheels on the sidewalk and its engine running in front of a neighbor's house. When Rodriguez approached the car about ten minutes later, he saw Gallardo sitting in the driver's seat with his head slumped over. Appellant was in the front passenger's seat, "just sitting there," repeatedly mumbling, "Why'd you do it?" Appellant's hands were up in the air and he had blood on his fingers. It appeared to Rodriguez that appellant and Gallardo were drunk or on drugs. Rodriguez reached into the car, turned off the engine, and called 9-1-1. Rodriguez did not see a knife.

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[1] All statutory references are to the Penal Code, unless otherwise noted.

Rodriguez and other neighbors stayed near the car, waiting for the police to arrive. During that time, appellant kept his hands in the air, did not acknowledge Rodriguez's presence, and did not make any attempt to get out of the car or move in any way.

Officer Michael Ford of the Baldwin Park Police Department arrived about 10 minutes later. He was trained in traffic investigation and did not see any skid marks. He opined that the Kia had been travelling very slowly and that the driver did not slam on the brakes before the car rolled onto the sidewalk and stopped. When Officer Ford approached the Kia, Gallardo was in the driver's seat with his head bent down toward his lap and drool coming from his mouth. Gallardo's eyes were open and he was breathing. The car's interior smelled of alcohol. Officer Ford asked Gallardo questions, pinched his ears and shook his shoulders, but Gallardo did not respond. Ford summoned paramedics.

Appellant was sitting in the passenger's seat, looking straight ahead, with his hands in the air. When Officer Ford asked appellant a question and shook his shoulder, appellant did not respond or move. At that point, Officer Ford saw the handle of a knife sticking out of Gallardo's neck. Ford also noticed blood on the fingertips of appellant's left hand. When Ford and other officers removed appellant from the car and laid him on some grass near the sidewalk, he remained unresponsive.

Gallardo died from a single knife wound, three and three-fourths inches deep, that entered just above his right shoulder bone and penetrated his lungs. The deputy medical examiner testified that "it would take significant force to cause that penetration and to go that deep." Gallardo had no offensive or defensive wounds. An autopsy showed Gallardo had a blood alcohol level of .15 percent. His blood tested negative for other drugs. Appellant had cuts on his fingers, but no other injuries. Tests showed the blood found on appellant's fingers belonged to him and Gallardo.

Defense Case

Both appellant's mother and a mutual friend of appellant's and Gallardo's testified they were unaware of any problems or conflicts between appellant and Gallardo, who had

been close friends for many years. On the morning he died, Gallardo called the mutual friend and said that he and appellant had been hanging out and drinking together the previous night. He did not mention any problems or arguments with appellant.

Paramedics took appellant from the crime scene to the hospital, arriving about 1:45 p.m. Baldwin Park Police Department Officer Norman Gonzalez rode with appellant in the ambulance to the hospital, remained with him at the hospital for three hours, and then transported him to jail. Appellant was unresponsive throughout the trip and when he arrived at the hospital. He was assessed on the Glasgow Coma Scale, a standard measure of alertness, and received the lowest measurement possible, indicating he was nonresponsive to pain or any other stimuli. Appellant's blood alcohol level, based on blood drawn at 2:15 p.m., was .184 percent. He tested negative for any drugs. Appellant did not "wake up" and become responsive and alert until 3:45 p.m. Because he had no other medical problems, appellant was discharged about an hour later and taken to jail.

Dr. Hy Malinek, a clinical and forensic psychologist, testified as an expert witness. He reviewed police reports and numerous documents related to the crime and appellant's background, interviewed appellant and his parents, and conducted standardized testing on appellant. The testing indicated appellant was passive, dependent, depressed, had low self-esteem and elevated anxiety, was not a sociopath, and did not have violent tendencies. According to the history obtained by Dr. Malinek, appellant suffered from depression in 2005, for which he was treated with Paxil. Appellant also had a history of alcohol abuse, beginning at age 11 or 12. Dr. Malinek diagnosed appellant with dysthymic disorder, a form of depression, and either alcohol dependence or significant alcohol addiction. Dr. Malinek opined that appellant was intoxicated with alcohol at the time of the stabbing. In Dr. Malinek's opinion, the scenario of a person who does not flee a crime scene after committing a violent crime raises questions about the person's ability to process and understand what is happening. According to Dr. Malinek, while it is unlikely that a person could kill another person while in an alcohol-induced blackout, it

is possible for a person intoxicated with alcohol to enter a blackout after killing a person, due to the trauma of the event.

Dr. Ari Kalechstein, a neuropsychologist, testified as an expert on the effects of alcohol, stating that alcohol affects the blood flow to the brain and can impair a person's judgment, planning, impulse control and inhibitions, and can make someone more likely to engage in arguments. According to Dr. Kalechstein, a person experiencing an alcohol-induced blackout would be so intoxicated that it would be highly unlikely the person could understand the implications of his or her behavior or be able to process information normally during that period. Such a person could stab someone and have a clouded memory about the incident afterward. An alcohol-induced delirium is an altered mental state with fluctuating states of consciousness, such that the person appears conscious at some points and unconscious at others. One symptom of alcohol-induced delirium is non-responsiveness to others. It is possible for a person experiencing an alcohol-induced delirium to perceive a threat which does not exist.

Dr. Kalechstein interviewed appellant and reviewed the police reports and appellant's medical records, which indicated appellant had a prior history of alcoholism and of alcohol-induced blackouts. Dr. Kalechstein found several indicators that appellant was intoxicated from alcohol during the stabbing, including the presence of empty alcohol containers in the car, appellant's blood alcohol level, appellant being in a stupor when found in the car, and being passed out on the way to the hospital. Based on a reported blood alcohol level of .184 percent 60 to 90 minutes after appellant was removed from the car, Dr. Kalechstein estimated that appellant's blood alcohol level was between .205 percent and .22 percent when he was removed from the car.
Dr. Kalechstein opined that appellant was experiencing an alcohol-induced delirium at the time he was apprehended.

Rebuttal Case

According to criminalist Warren Best, frequent drinkers can have higher alcohol tolerance levels, rendering them less impaired than other drinkers at the same blood alcohol level. Depending on a person's tolerance level, it is possible for someone with a blood alcohol level as high as .30 percent to drive, care for himself, and not experience a blackout. Conversely, it is possible for a person with a .17 percent blood alcohol level to be unable to take care of himself. According to a study conducted by Best from 1988 to 1989, the average blood alcohol level of people arrested for driving under the influence in 1988-1989 was .17 percent.

The emergency room physician who treated appellant was unable to determine the cause of appellant's non-responsiveness. The physician testified that alcohol-induced unconsciousness is more typically seen at a .30 percent blood alcohol level, whereas appellant's was .184 percent.

DISCUSSION

I. Contentions and Forfeiture.

Appellant contends the trial court relied on improper factors in sentencing him to the upper term of four years for involuntary manslaughter. First, he argues the court improperly relied on the fact that the victim was killed, an element of manslaughter. Second, he argues the court relied on facts suggesting appellant was conscious at the time of the crime, which violated the Double Jeopardy Clause of the Fifth Amendment because it was inconsistent with an implied jury finding of unconsciousness.

It is the People's position that appellant has forfeited these contentions because he did not object to either of these factors at sentencing or raise a claim of double jeopardy. "[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; *People v. De Soto* (1997) 54 Cal.App.4th 1, 7–8; *People v. Erdelen* (1996) 46 Cal.App.4th 86, 90–91.) Moreover, the

defense of double jeopardy cannot usually be raised for the first time on appeal. (*People v. Scott* (1997) 15 Cal.4th 1188, 1201.) The People argue that by failing to raise these issues at sentencing, appellant deprived the trial court of the ability to further explain and clarify its reasoning. We agree with the People. But in order to forestall a claim of ineffective assistance of counsel, we address the merits of appellant's contentions. (See *People v. Mattson* (1990) 50 Cal.3d 826, 854; *People v. Scaffidi* (1992) 11 Cal.App.4th 145, 151; *People v. Norwood* (1972) 26 Cal.App.3d 148, 153.)

II. Relevant Law and Standard of Review.

When a trial court must choose among three possible terms of imprisonment, it must choose the term which "best serves the interests of justice." (§ 1170, subd. (b).) The choice "shall rest within the sound discretion of the court." (*Ibid.*; *People v. Moberly* (2009) 176 Cal.App.4th 1191, 1195–1196.) The court must state its reasons for the record. (§ 1170, subd. (b); Cal. Rules of Court, rule 4.420(e).) But the court need not cite facts that support its decision or weigh aggravating and mitigating circumstances. (*People v. Sandoval* (2007) 41 Cal.4th 825, 846–847.) Under California's determinate sentencing law, "a trial court is free to base an upper term sentence upon any aggravating circumstance that the court deems significant, subject to specific prohibitions." (*Id.* at p. 848.) "The court's discretion to identify aggravating circumstances is otherwise limited only by the requirement that they be 'reasonably related to the decision being made.'" (*Ibid.*)

"[T]he court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law." (§ 1170, subd. (b); *People v. Moberly, supra,* 176 Cal.App.4th at p. 1197 [a trial court cannot use an element of the crime or a fact found as an enhancement as a factor in aggravation]; Cal. Rules of Court, rule 4.420(d).) Aggravating circumstances are not limited to the factors listed in California Rules of Court, rule 4.421. An aggravating circumstance may be broadly defined as any circumstance that makes the offense "'distinctively worse than the

ordinary'" and makes the defendant "deserving of punishment more severe than that merited for other offenders in the same category." (*People v. Black* (2007) 41 Cal.4th 799, 817.) "[T]he existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term." (*Id.* at p. 813.)

When challenging a discretionary sentencing choice on appeal, the burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. (*People v. Carmony* (2004) 33 Cal.4th 367, 376; *People v. Weaver* (2007) 149 Cal.App.4th 1301, 1318.) A trial court also abuses its discretion "if it relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision." (*People v. Sandoval, supra,* 41 Cal.4th at p. 847.) When reviewing the trial court's reasons for choosing a sentence, "[i]t is not for the appellate court to conjure the reasons the trial court could have recited to support its sentencing decision from the many options listed in the statutes and court rules. We review the trial court's reasons—we do not make them up." (*People v. Cardenas* (2007) 155 Cal.App.4th 1468, 1483.) "The reviewing court cannot substitute its reasons for those omitted or misapplied by the trial court, nor can it reweigh valid factors bearing on the decision below." (*People v. Scott, supra,* 9 Cal.4th at p. 355.) Remand is required unless it is "'not reasonably probable that a more favorable sentence would have been imposed in the absence of the error.'" (*Ibid.*; *People v. Davis* (1995) 10 Cal.4th 463, 552; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

III. The Trial Court Did Not Abuse Its Discretion.

Appellant first complains that the trial court improperly relied on the victim's death, an element of involuntary manslaughter, as a factor supporting the upper term.[2] Appellant quotes the court's following statements at the sentencing hearing: "The next assessment is evaluating the low term, midterm, high term. And I select the high term.

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[2] Section 192 states that "Manslaughter is the unlawful killing of a human being without malice."

I recognize that the knife use that's been utilized in terms of why this is not a probationary case. That knife use could make a commercial burglary a nonprobationary case. This is a murder case. He killed someone. And I use the word 'killed' because it's a homicide not a murder case. It's a homicide, but there was a killing. So the killing is what—knife use, non-probation could apply across a panoply of different kinds of felonies. This is a case where a person was killed. And so the court selects the high term of four years relative to that assessment."

The People counter that the court's references to the facts that appellant "killed someone," and that "a person was killed" were made in the context of discussing appellant's use of a knife, which is not an element of involuntary manslaughter. The People note that just after the court made these statements, it launched into a colloquy with the prosecutor regarding whether the use of a knife could properly serve as a basis for both denying probation and imposing a one-year weapons enhancement.

We cannot discern from the trial court's statements whether it was improperly using an element of the crime to choose the upper term. It can be plausibly argued from the quoted statements that the trial court might have done so. This is precisely why defendants are required to raise timely objections at sentencing and to seek clarification of the court's reasons if unclear. (*People v. Scott, supra*, 9 Cal.4th at pp. 354–355.) But this was not the only reason given by the trial court.

Appellant argues the trial court made further comments that "suggest" it chose the upper term based "on its belief that appellant was **not** unconscious of the nature of his actions, as the jury had found." Appellant notes the trial court relied on reports prepared by Drs. Malinek and Kalechstein not shown to the jury that contained statements made by appellant regarding the offense. Appellant quotes the trial court's statements: "And while the alcoholism is certainly a part of it and mental health history is part of it, it's clear from the reports of Malinek as well as the neuropsychiatrist, that the statements the defendant made to them there was a lot more to what was going on prior to the fatal act—

tension, anger, dispute—that culminated in the fatal blow. So I want to state that for the record as well, that that's my evaluation of this case."

According to appellant, "to whatever extent the trial court relied on a belief that appellant was conscious, its reliance violated the double jeopardy clause of the Fifth Amendment to the United States Constitution" because the jury had already found beyond a reasonable doubt that appellant was unconscious at the time of the offense. The People note the jury was instructed that involuntary manslaughter required, among other things, that "[a]s a result of voluntary intoxication, the defendant was not conscious of his actions *or* the nature of those actions." (CALCRIM No. 626, italics added.) According to the People, "Because the last part of that sentence was phrased in the disjunctive, the jury could have found appellant was conscious of his basic actions, but not conscious of their full implications, consequences, and homicidal nature," and that "[s]uch a finding would not have been inconsistent with the trial court's reasons for imposing the upper term." The People's argument is persuasive. But again, we cannot tell from the quoted statements whether the trial court was relying on an invalid reason in choosing the upper term.

However, even assuming the trial court applied invalid factors in reaching its decision, appellant does not focus on a third reason given by the trial court for imposing the upper term. The court stated: "And alcoholism/mental health does not mitigate that even bringing—I recognize the presumptive term is the midterm, but under these circumstances—and frankly with the extensive history, whether it's resulted in criminal prosecutions or convictions or not, and in his case primarily it has not, [appellant] has been building up to a level that culminated in this very tragic circumstance. So four years high term."

The probation officer's report, which the court indicated it had read, noted appellant was convicted in 2006 of misdemeanor Vehicle Code counts of driving on the wrong side of a divided highway and driving without lights in the dark. In recommending the upper term, the probation report stated: "In regard to this instant

matter before the court, it appears the defendant may have ongoing and escalating issues with substance abuse that have gone unchecked. As a direct result of this is the instant matter before the court, which alleges the defendant violently attacked the victim with a knife that subsequently resulted in the victim's death. Clearly, the defendant's apparent substance abuse and aggressive behavior presents a serious danger to society." The probation report also noted that appellant's mother had told police officers that appellant "'drinks a lot,'" and that "'he's an alcoholic, drinks hard liquor, and he doesn't know what happened to him when he wakes up sober." The probation report did not mention alcoholism or mental health as mitigating factors.

Earlier in the sentencing hearing when denying probation, the trial court stated that "in this particular case" it weighed "public safety" more heavily than alcoholism or mental health. The court noted that appellant's 2006 incident is "just a little glimmer of what alcoholism/mental health has done in [appellant's] past that has caused him to act out in a way that really significantly impacts the public . . . . But I put significance on that in looking at public safety particularly when here we have another incident where there's this drinking of throughout an extended period of time, loss of control, a violent outcome that killed a person."

We agree that appellant's history of drinking to the point of losing control and placing others' safety in jeopardy, and then culminating in the current tragedy, is "'reasonably related to the decision being made.'" (*People v. Sandoval, supra,* 41 Cal.4th at p. 848.) It is supported by the record, and is a valid basis for the trial court's sentencing choice. (See *People v. Reyes* (1987) 195 Cal.App.3d 957, 960–964 [finding substance abuse can be an aggravating factor]; *People v. Regalado* (1980) 108 Cal.App.3d 531, 539–540 [same]; Cal. Rules of Court, rule 4.421 [the defendant has engaged in violent conduct that indicates a serious danger to society].) As noted above, "the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term." (*People v. Black, supra,* 41 Cal.4th at p. 813; *People v. Lashley* (1991) 1 Cal.App.4th 938, 952–953 [erroneous application of certain

factors does not entitle defendant to remand where at least one factor is sufficient to support the upper term]; *People v. Dreas* (1984) 153 Cal.App.3d 623, 636.)

Accordingly, we find the trial court did not abuse its discretion in selecting the upper term.

DISPOSITION

The judgment is affirmed.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST