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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. GENE AUTRY McCALEB, Defendant and Appellant.	B271285 (Los Angeles County Super. Ct. No. MA066999)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa M. Strassner, Judge. Affirmed.

James R. Bostwick, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell, Deputy Attorney General, for Plaintiff and Respondent.

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Defendant Gene Autry McCaleb appeals from the judgment following a trial at which the jury convicted him of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1); count 2)[1] during which he inflicted great bodily injury (§ 12022.7, subd. (a)). The trial court denied probation and sentenced him to prison to a six-year term consisting of the three-year middle term, plus a three-year great bodily injury enhancement.

Defendant contends the trial court abused its discretion in denying him probation, because he is eligible due to unusual circumstances and the court failed to consider those circumstances and find thereby the presumption of probation ineligibility had been overcome.

We affirm the judgment. There was no abuse of discretion. A presumption against the grant of probation arises if the defendant attempted to use or used a deadly weapon or he willfully inflicted great bodily injury on another. Substantial evidence supports the trial court's finding that defendant willfully caused great bodily injury by personally swinging a deadly weapon "specifically at [the victim], hitting her in the face which caused the great bodily injury." Further, the record reflects the trial court considered whether this was an "unusual case[] where the interests of justice would best be served if [defendant] is granted probation." (§ 1203, subd. (e).) The court

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1 All further section references are to the Penal Code.

After the jury became deadlocked on the remaining counts, the trial court declared a mistrial and dismissed the charges of mayhem (§ 203; count 1) and battery with serious bodily injury (§ 243, subd. (d); count 3).

did not abuse its discretion in finding that the presumption of probation ineligibility had not been overcome.

BACKGROUND[2]

On September 16, 2015, about 10:00 p.m., Myeshia Morrow arrived for a visit at her friend Pina's house in Lancaster, California. After David Harvey, her stepfather, parked in the driveway, Ms. Morrow exited and spoke with her friend outside the house.[3] Afterward, Ms. Morrow returned to the passenger side of the car and leaned inside as she spoke to Mr. Harvey. Meanwhile, defendant arrived and exited a car driven by another. While walking up the driveway towards the house, defendant slapped Ms. Morrow's buttocks.[4]

Angry, Ms. Morrow told defendant not to disrespect her. After he responded with a flippant remark and started to walk

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[2] This recital accords with the appellate review standard. "[W]e review the entire record in the light most favorable to the judgment to determine whether it contains evidence that is reasonable, credible, and of solid value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] 'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.' [Citation.]" (*People v. Elliott* (2012) 53 Cal.4th 535, 585.)

[3] Mr. Harvey's 11-year-old son was in the car's back seat.

[4] Defendant, his wife, and another man lived in the same house with Ms. Morrow's friend. For several years, defendant and Ms. Morrow had a sexual relationship. They had been friends for nine years.

off, Ms. Morrow followed, cursing him. Defendant turned and hit her with his hand. They then engaged in a punching and wrestling fight, ending with defendant straddling Ms. Morrow as she lay on her back on the ground.

Ms. Morrow returned to the car, and sat in the passenger seat with the window about half way open and the door closed. Defendant, who appeared angry, went inside the house. Seconds later, he stormed back outside carrying with both hands a three-foot metal fireplace poker that had a sharp edge and a sharp hook. As defendant approached, Mr. Harvey shouted to defendant not to hit his car. After hesitating, defendant swung the poker like a baseball bat at Ms. Morrow's face, striking and piercing her right cheek, which bled, and chipping a tooth.

As defendant walked towards the house, Ms. Morrow exited the car, picked up and swung a wooden board at him, striking his side. Defendant struck her left rib cage with the poker, which left a bruise. Ms. Morrow called police on her cell phone.

Ms. Morrow passed out as Mr. Harvey drove her to the hospital. She received about eight stitches to close the cheek wound, which left a scar.

At trial, defendant claimed he acted in self-defense in grabbing the fireplace poker, because Ms. Morrow had attacked him on a prior occasion. After he approached and shoved Ms. Morrow's head to get her to exit and await the police, Ms. Morrow left the car, picked up a two-by-four board, and hit his shoulder and face. He responded by swinging the poker at her, hitting her once. Defendant admitted when interviewed by the police, he did not mention the poker.

DISCUSSION

A statutory presumption that a criminal defendant is ineligible for probation arises if the defendant "used, or attempted to use, a deadly weapon upon a human being in connection with the perpetration of the crime of which he or she has been convicted" (§ 1203, subd. (e)(2)) or, alternatively, "willfully inflicted great bodily injury" on another (*id.*, subd. (e)(3)). This presumption is overcome "in unusual cases where the interests of justice would best be served if the person is granted probation[.]" (*Id.*, subd. (e).)

Defendant contends the trial court abused its discretion in denying him probation, because "mitigating facts supported overruling the presumption of ineligibility" and the court failed to consider such facts and make a finding that the presumption of probation ineligibility had been overcome. His contention is meritless.

1. Probation/Sentencing Hearing

At the hearing, defense counsel urged the trial court to grant defendant probation in view of his age, almost 70 years old, and because his crime "appears to be his only violent offense he's committed in his life." Relying on mitigating circumstances in rule 4.423 of the California Rules of Court,[5] he also argued defendant's criminal record was insignificant. His only prior adult conviction for forgery, a non-violent offense, dated back 30 years (rule 4.423(b)(1)); the victim in this case instigated the incident, or at least escalated it (rule 4.423(a)(2)&(3)); and the incident arose from unusual circumstances that were unlikely to

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[5] All further references to rules are to those of the California Rules of Court.

recur (rule 4.423(a)(3)). Counsel urged defendant overreacted and "his temper got to him."

Although acknowledging mitigating circumstances existed, the prosecutor argued "the infliction of great bodily injury is, itself, enough to make probation improper in this case."[6]

After noting it was "very troubled by this case, and the facts that came out at trial," the trial court expressly found "[defendant] is presumptively ineligible for probation pursuant to . . . section 1203(e)(2) and 1203(e)(3)."

In determining whether that presumption was overcome, the court considered both the circumstances in mitigation and aggravation and determined "there's actually more circumstances in aggravation than mitigation" and implicitly found this was not an "unusual" case "where the interests of justice would best be served if [defendant] is granted probation[.]" (§ 1203, subd. (e).)

The court began by acknowledging there were "circumstances in mitigation, that being predominately [defendant's] insignificant record of any prior instances other than . . . a misdemeanor[.]" It also noted an argument could be made that Ms. Morrow or defendant was the instigator of the fight. The court then explained why "[t]he court is very troubled by the fact that this case involved great bodily injury with weapon."

The court pointed out Ms. Morrow had reached "a place of safety" in that she was back in the car and the door was closed. "[Defendant] went into the house, retrieved a deadly weapon,

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6 In the sentencing memorandum, the prosecutor argued defendant was presumptively ineligible for probation under section 1203, subdivision (e)(2) and (e)(3), because he "used a deadly weapon in this case and inflicted great bodily injury[.]"

came back outside to the car, was told by one of the witnesses not to hit the car. He went around and he swung specifically at Ms. Morrow, hitting her in the face, which caused the great bodily injury." The court emphasized this was "not one long continuous act. It is two separate acts" and "[defendant] lost control, went into his house and picked up a weapon and came back out" and swung the weapon at "Ms. Morrow, who was safely in the vehicle."

2. Presumption of Probation Ineligibility Applicable

Implicit in his claim that "mitigating facts supported overruling the presumption of ineligibility" is defendant's concession that the presumption of ineligibility applies. We reject his attempt to backpedal by arguing the great bodily injury ineligibility factor (§ 1203, subd. (e)(3)) does not apply, because the trial court did not make a finding he "willfully" inflicted great bodily injury and that the use or attempted use of a deadly weapon ineligibility factor (*ibid.*) merely "was potentially applicable[.]"

Defendant asserts the trial "court did not find that [defendant] willfully inflicted the injury to Morrow. The evidence on whether [defendant] was trying to hit Morrow or the car is ambiguous. Morrow was sitting in the car and when [defendant] swung the poker it might have hit either the car or Morrow." These assertions of fact are unsupported by the record.

As defendant himself acknowledges, the trial court expressly stated "[defendant] went into the house, retrieved a deadly weapon, came back outside to the car, was told by one of the witness[es] not to hit the car. He went around and he swung *specifically at Ms. Morrow*, hitting her in the face which caused the great bodily injury." (Italics added.) The trial court thus

implicitly found defendant intentionally, i.e., "willingly," inflicted great bodily injury on Ms. Morrow, which implied finding is supported by substantial evidence. (*People v. Jenkins* (2000) 22 Cal.4th 900, 973 (*Jenkins*); cf. *People v. Lewis* (2004) 120 Cal.App.4th 837, 854 [remand for new hearing where no finding defendant intended to inflict great bodily injury].)

Without further discussion, we reject, as unsupported by reasoned argument and applicable authority, defendant's contention that the use or attempted use of a deadly weapon ineligibility factor (§ 1203, subd. (e)(3)) merely "was *potentially* applicable," rather than actually applicable. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; accord, *People v. Bryant* (2014) 60 Cal.4th 335, 363-364.)

3. Probation Ineligibility Presumption Not Overcome

Defendant contends the trial court abused its discretion by failing to consider whether the presumption against probation was overcome and by not finding the presumption was overcome by "unusual circumstances."[7] The record refutes these claims of error.

"We view the record in the light most favorable to the trial court's ruling, deferring to those express or implied findings of fact supported by substantial evidence. [Citations.]" (*Jenkins*, *supra*, 22 Cal.4th 900, 973.) A trial court's finding that a

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[7] Additionally, he contends once the trial court found the probation ineligibility presumption was overcome, it was incumbent on the court to apply the factors in rule 4.414 and grant him probation. We need not, and therefore do not, address this contention, because defendant fails to establish the presumption was overcome.

defendant has failed to overcome the presumption of probation ineligibility and the court's decision to deny or grant probation are subject to appellate review for abuse of discretion. (*People v. Superior Court* (*Du*) (1992) 5 Cal.App.4th 822, 831.) The burden rests with the challenger to show the court acted irrationally or arbitrarily. (*Ibid*.)

The presumption of probation ineligibility is overcome "in unusual cases where the interests of justice would best be served if the person is granted probation[.]" (§ 1203, subd. (e).) Rule 4.413 enumerates the criteria relevant to a trial court's determination whether an "unusual" case exists. "Under rule 4.413, the existence of any of the listed facts does not necessarily establish an unusual case; rather, those facts merely '*may* indicate the existence of an unusual case.' (Rule 4.413(c), italics added.) This language indicates the provision 'is permissive, not mandatory.' [Citation.] '[T]he trial court may but is not required to find the case unusual if the relevant criterion is met under each of the subdivisions.' [Citation.]"[8] (*People v. Stuart* (2007) 156 Cal.App.4th 165, 178 (*Stuart*).)

"If a court determines the presumption against probation is overcome, it evaluates whether or not to grant probation pursuant to California Rules of Court, rule 4.414. However, 'mere suitability for probation does not overcome the presumptive bar. . . . [I]f the statutory limitations on probation are to have any substantial scope and effect, "unusual cases" and "interests of

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[8] We emphasize it is not enough the trial court finds an "unusual case" pursuant to rule 4.413, because the court must make the further finding that a grant of probation in such "unusual case" would be in the "best interests of justice" before the presumption of probation ineligibility is overcome.

justice" must be narrowly construed,' and rule 4.413 'limited to those matters in which the crime is either atypical or the offender's moral blameworthiness is reduced.' [Citation.]" (*Stuart, supra,* 156 Cal.App.4th at p. 178.)

The parties here agree the following criteria in rule 4.413 are applicable to the two ineligibility factors found by the trial court, i.e., attempted use or use of a deadly weapon (§ 1203, subd. (e)(2)) and willful infliction of great bodily injury (*id.,* subd. (e)(3)). As to facts showing an unusual case, the applicable criterion is: "The fact or circumstance giving rise to the limitation on probation is, in this case, 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" (rule 4.413(c)(1)(A)). As to facts limiting the defendant's culpability, the applicable criteria are: "The defendant participated in the crime under circumstances of great provocation, coercion, or duress not amounting to a defense, and "[t]he defendant has no recent record of committing crimes of violence" (rule 4.413(c)(2)(A)) and "[t]he defendant is youthful or aged, and has no significant record of prior criminal offenses" (rule 4.413(c)(2)(C)).

Defendant urges "the circumstances of this case satisfy the 'unusual case' eligibility factors in Rule 4.413." He first argues "the facts indicate [Ms. Morrow] provoked [defendant's] anger and that he was trying to hit the car rather than Morrow." "The circumstances of the assault were unusual. [Defendant] apparently slapped Morrow's behind because to him it seemed like a fun prank, but she responded very aggressively [and before] long a fight broke out." After defendant exited the house

with the poker, Mr. Harvey told him not to hit his car and "[n]o one testified that [defendant] redirected his swing toward Morrow because of what Harvey yelled at him. Unfortunately instead of staying in the car Morrow got out and was struck with the poker." He next points out he "has no record of committing violent crimes in the past. He has only one prior conviction for misdemeanor forgery in 1985." Also, at "sentencing, [he was] almost 70 years old."

We are not persuaded. The record refutes defendant's characterization of his willful infliction of great bodily injury on Ms. Morrow. The mutual combat situation had ended before defendant walked into the house, retrieved the poker, and approached the car into which Ms. Morrow had retreated. At that point in time, Ms. Morrow was a noncombatant. After Mr. Harvey told defendant not to hit the car, defendant approached Ms. Morrow, and swung the poker directly at her face through the partially open car window, causing great bodily injury to her cheek. That defendant struck Ms. Morrow's side with the poker after she left the car was not the factual basis for the great bodily injury finding.

The trial court was aware defendant was almost 70 years old but did not find this mitigating circumstance particularly significant. The court acknowledged but did not find compelling defendant's insignificant criminal record, another mitigating circumstance. In impliedly finding this was not an "unusual case," the trial court balanced the mitigating circumstances against the aggravating circumstances and expressly found the latter outweighed the former, which finding is supported by substantial evidence. (See *People v. Slaughter* (1987) 194 Cal.App.3d 95, 99 [no requirement trial court explain why case

not "unusual"].) The trial court's determination that the presumption of probation ineligibility was not overcome therefore is not an abuse of discretion.[9]

DISPOSITION

The judgment is affirmed.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.

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[9] Further, having found the presumption of probation ineligibility had not been overcome, the trial court was not required to state its reasons for denying probation. (*People v. Lesnick* (1987) 189 Cal.App.3d 637, 644.)