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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

CRAIG WHITNEY,

Defendant and Appellant.

B276180

(Los Angeles County
Super. Ct. No. MA067043)

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

Marta I. Stanton, 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, Scott A. Taryle and Timothy L. O'Hair, Deputy Attorneys General, for Plaintiff and Respondent.

Craig Whitney appeals from a judgment entered after a jury found him guilty of assault by means of force likely to produce great bodily injury (Pen. Code,¹ § 245, subd. (a)(4)) upon one victim and misdemeanor simple battery (§§ 242 & 243, subd. (a)) upon another. The jury further found to be true the special allegation that Whitney inflicted great bodily injury upon the assault victim. (§ 12022.7, subd. (a).) The trial court sentenced him to seven years in prison. Whitney contends we must reverse his assault conviction because the prosecution presented insufficient evidence establishing he did not act in self-defense. He also contends the trial court abused its discretion in denying probation and imposing “an irrational and arbitrary” sentence. We reject Whitney’s contentions and affirm the judgment.

BACKGROUND

Catherine Alexander’s Trial Testimony

According to battery victim Catherine Alexander’s trial testimony, about 12:00 p.m. on June 24, 2015, defendant Whitney knocked on the door of the home she shared with her father, mother and nephew. Catherine opened the door, and Whitney asked to speak to her father, 61-year-old assault victim, Joaquin Alexander.² Catherine did not recognize Whitney and told him Joaquin was not at home. Whitney reiterated he needed to speak to him. Catherine closed the door and woke up her father.

¹ Further statutory references are to the Penal Code.

² According to the information filed in this case, Whitney was 36 years old when he committed the offenses and 38 at the time of trial.

Joaquin walked outside, shirtless and shoeless, wearing boxer shorts and eyeglasses. Catherine followed him to the door. As she closed the door behind him, she heard “a thump,” as if “something fell.” She did not hear any yelling before she heard that noise, and she did not recall hearing either of the men speak.³ She opened the door and observed her father lying on the walkway, with his head pointing toward the door and his eyeglasses no longer on his face. He appeared unconscious and did not respond when she called to him. She observed Whitney standing about a foot behind her father’s feet and demanded to know what he had done to her father. Whitney did not reply. Catherine did not notice any injuries on Whitney.

According to Catherine, Whitney walked down the driveway to his truck and she followed him, continuing to ask what he had done to her father. He turned to face her, placed his hands on her shoulders, and pushed her down to the ground. She stood up, and he entered his truck. As she stepped off the curb to take a picture of the front license plate of his truck with her cell phone, he drove away. She was about two feet in front of his truck at the time he drove forward, and she moved out of the way to avoid being hit.⁴ She was not able to take the picture.

Catherine returned to her unconscious father and noticed blood under his right eye and nose. She dialed 911. Joaquin

³ Catherine estimated that one to three minutes elapsed between the time Joaquin walked outside and she heard “the thump.”

⁴ Shortly after the incident, when Catherine was interviewed by a sheriff’s deputy, she did not accuse Whitney of attempting to strike her with his vehicle.

regained consciousness before the paramedics arrived, but he did not seem to know what had happened. The paramedics transported him to the hospital.

The prosecution showed the jury a photograph of Joaquin's face that Catherine took after he arrived at the hospital (before bruising appeared) and others she took the following day (after bruising appeared). Joaquin was released from the hospital the same day the incident occurred.

Other Evidence Regarding Joaquin's Injuries

Deputy Sheriff Veronica Ramirez testified that when she arrived at the scene, she observed blood on Joaquin's face and an open laceration under his right eye that was beginning to swell. Ramirez recalled that Joaquin's speech was slow and "it was extremely difficult for him to . . . communicate with [her]."

Joaquin's medical records, which were admitted into evidence, indicated he sustained a fracture to his right eye socket on June 24, 2015.⁵

Whitney's Testimony

Whitney testified at trial, raising self-defense.

He stated he went to Joaquin's house on June 24, 2015 to discuss a debt Joaquin owed him. Joaquin borrowed \$500 in October 2014, and had only paid back \$40. The two men had met five years before when Whitney called for a taxicab and Joaquin picked him up. They became friends, and during those five years, Whitney hired Joaquin to drive him because he had sustained a conviction for driving under the influence.

⁵ The parties stipulated in front of the jury that Joaquin would not testify because he was deceased, and his death was not related to this case.

Catherine answered the door when Joaquin knocked on June 24. She initially stated her father was not at home, and then shut the door and went to get him. Joaquin exited the house and the two men walked toward the driveway. Whitney asked Joaquin when he planned to pay the debt. Joaquin became “disgruntled.”

Whitney described Joaquin’s conduct as follows: “He started getting very angry. And at one point he pushed me and then he threatened to kill me and he started ranting, and he continued pushing me and charging me.” Whitney backed up after the first push, but Joaquin “continued to charge,” pushing him two additional times. Feeling nervous and fearing for his safety,⁶ Whitney “took one swing at him.” Joaquin fell backward against the house. Whitney did not see him fall to the ground.

Catherine exited the house and ran toward Whitney as he walked toward his truck. She stopped about 10 feet away from him and turned to restrain her father, who was “charging” toward Whitney “with a weapon” that appeared to be a foot-long “sharpened rod or a long skewer.” As Whitney entered his truck, Catherine attempted to hold her father back as he shouted at Whitney, “I will kill you, motherfucker.” During the “struggle,” Catherine and Joaquin moved closer to Whitney’s truck. Joaquin reached over her as she tried to restrain him and “punch[e]d” Whitney’s truck with his fists, “leaving a dent in the hood.” Whitney drove away. He denied that Catherine had stepped into the street before or as he drove away.

⁶ Whitney stated he was five feet seven inches tall and Joaquin was five inches taller at six feet.

Whitney testified he did not observe any injury on Joaquin's face. He further testified he did not take a picture of the dent on the hood of his truck or get it fixed. At the time of trial, the dent was still there. Although he told a detective about the dent, he did not show it to him because he only spoke to him on the telephone.

Whitney did not call any other witnesses in his defense.

Verdicts and Sentence

The jury found Whitney guilty of assault by means of force likely to produce great bodily injury (count 1) and further found to be true the special allegation that Whitney inflicted great bodily injury upon Joaquin. The jury also found Whitney guilty of simple battery upon Catherine (count 4). The jury found Whitney not guilty of assault with a deadly weapon (a car) upon Catherine (count 2) and dissuading a witness (Catherine; count 3).

The trial court sentenced Whitney to seven years in prison: the upper term of four years for the assault, plus three years for the great bodily injury enhancement. For the battery, the court imposed a concurrent term of 180 days.

DISCUSSION

Sufficient Evidence Supports the Assault Conviction

Whitney contends we must reverse his assault conviction because there is insufficient evidence establishing he did not act in self-defense.

“An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” (§ 240.) To find a defendant guilty of assault by means of force likely to produce great bodily injury, the prosecution must prove:

“1. The defendant did an act that by its nature would directly and probably result in the application of force to a person, and the force used was likely to produce great bodily injury;

“2. The defendant did that act willfully;

“3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone;

“4. When the defendant acted, he had the present ability to apply force likely to produce great bodily injury; and

“5. The defendant did not act in self-defense.” (CALCRIM No. 875.)

“Typically, the prosecution has the burden to prove a defendant did not act in self-defense, because self-defense negates an element of the offense.” (*People v. Saavedra* (2007) 156 Cal.App.4th 561, 571; *People v. Adrian* (1982) 135 Cal.App.3d 335, 340-342 [prosecution has the burden of disproving self-defense beyond a reasonable doubt in proving the defendant committed an assault].) Using CALCRIM No. 875, the trial court instructed the jury that to prove Whitney guilty of the assault offense, the prosecution was required to prove Whitney did not act in self-defense.

The trial court also instructed the jury, in pertinent part, that a “defendant acted in lawful self-defense if:

“1. The defendant reasonably believed that he was in imminent danger of suffering bodily injury or was in imminent danger of being touched unlawfully;

“2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger; and

open, during the entire incident and did not hear any yelling (or “ranting,” as Whitney described Joaquin’s manner of speaking) before Joaquin hit the ground. It is evident from the verdicts the jury disbelieved Whitney’s testimony that he punched Joaquin because he believed he was in imminent danger. Substantial evidence establishes Whitney did not act in self-defense.⁷

The Trial Court Did not Err in Sentencing Whitney

Whitney contends the trial court abused its discretion in denying probation and imposing “an irrational and arbitrary” sentence. As set forth above, the court sentenced Whitney to seven years in prison: the upper term of four years for the assault, plus three years for the great bodily injury enhancement. For the battery, the court imposed a concurrent term of 180 days.

In his sentencing memorandum, Whitney urged the trial court to grant him probation. He acknowledged he inflicted great bodily injury on Joaquin, but argued “the interests of justice would be served by granting [him] probation because (1) he had successfully completed probation in three out of four prior cases,”⁸

⁷ We reject Whitney’s assertions that the jury’s not-guilty verdicts on assault with a deadly weapon upon Catherine and dissuading a witness (Catherine), and the jury’s inquiry about photographs of the dent on the hood, demonstrate the jury doubted Catherine’s credibility about what she heard as she stood by the partially open door. The verdict on the assault count shows the jury believed Catherine’s testimony, which constitutes substantial evidence supporting the conviction.

⁸ Whitney’s criminal record includes a 2000 conviction for misdemeanor reckless driving, a 2006 conviction for misdemeanor vandalism, a 2008 conviction for misdemeanor obstructing a public officer, and 2010 felony convictions for

(2) he was employed, earning about \$2,000 per month, (3) he would be able to pay restitution if he was on probation, (4) he had two sons who were 12 and 13 years old, and (5) the probation report recommended he “be granted probation with an execution of state prison sentence suspended and a suitable amount of county jail time.”⁹ Whitney also noted he “only hit [Joaquin] once” and “only pushed [Catherine] once.” He further asserted he “would not be a danger to others if granted probation because this appears to be an isolated incident caused by anger at [Joaquin] due to his failure to pay back the debt of \$500.00.”

In its sentencing memorandum, the prosecution urged the trial court to impose the high term of four years for the assault, plus three years for the great bodily injury enhancement, and a consecutive term of 180 days for the battery, for a total sentence of seven years and six months. The prosecution cited the following factors in aggravation: (1) Whitney engaged in violent conduct in punching Joaquin, (2) Whitney caused great bodily

driving under the influence causing bodily injury and felony hit and run causing injury. He sustained a probation violation in the 2008 case.

⁹ Section 1203, subdivision (e)(3) provides, “[e]xcept in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted” to “[a]ny person who willfully inflicted great bodily injury or torture in the perpetration of the crime of which he or she has been convicted.” In his sentencing memorandum, Whitney conceded this statute rendered him presumptively ineligible for probation. On appeal, he does not dispute the applicability of this statute, which the Attorney General cited in the respondent’s brief.

injury to Joaquin, (3) Joaquin was a vulnerable victim who was more than 20 years older than Whitney and was assaulted “at his home after he had been woken from his nap and was only wearing a pair of boxers,” and (4) Whitney had a criminal record, with convictions increasing in seriousness. (Cal. Rules of Court, rule 4.421(a)(1)-(2) & (b)(1)-(2).)

Before sentencing Whitney, the trial court reviewed the sentencing memoranda and heard oral argument. After “balancing things like public safety” and Whitney’s “record,” the court denied probation. The court noted Whitney inflicted great bodily injury on Joaquin, had been granted probation in prior cases, and did not appear remorseful during trial when he testified in his defense.¹⁰

The trial court imposed the upper term of four years for the assault, explaining “aggravating factors outweigh mitigating factors for the following reasons: [¶] His previous record that I previously already cited. He’s had previous probationary grants. Given the convictions on [*sic*] this case, they are crimes of violence. They are increasingly serious in nature.”

In his opening appellate brief, Whitney asserts “[p]robation or the imposition of the low or middle term is the appropriate sentence.” Although he may want a lesser sentence, he cannot

¹⁰ Whitney argues that in denying probation, the trial court “punished him for presenting a defense” because the court commented, “In listening to the trial, he did testify on his behalf claiming self-defense. The sense I was getting is that he was not -- did not appear to be particularly remorseful.” The court was commenting on Whitney’s apparent lack of remorse for causing great bodily injury to Joaquin, not the fact he presented a defense.

demonstrate the trial court erred in denying probation and imposing the upper term.

Whitney acknowledges the trial court has broad discretion in deciding to grant or deny probation. (*People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1530.) We reverse only where the trial court's decision is arbitrary, capricious or exceeds the bounds of reason. (*Id.* at p. 1530.) A trial court may impose an upper term sentence based on a single aggravating circumstance. (*People v. Black* (2007) 41 Cal.4th 799, 816-818.) The "same fact may be used both to deny probation and to support imposition of an upper term sentence." (*Id.* at p. 817.)

The trial court's decision to deny probation was not arbitrary or capricious and it does not exceed the bounds of reason. Whitney had been placed on probation in prior cases and yet continued to commit crimes of increasing seriousness. In this case, he inflicted great bodily injury upon his victim. Nor did the trial court abuse its discretion in imposing the upper term based on the increasing seriousness of Whitney's convictions. (Cal. Rules of Court, rule 4.421(b)(1)-(2).)¹¹ He committed three misdemeanors and then two felonies, before committing the violent felony in this case. The court considered the factors Whitney cited in mitigation, and found the circumstances in aggravation outweighed those factors. We have no cause to disturb the court's decision.

¹¹ In support of his assertion the trial court should have granted probation or imposed the low or middle term, Whitney does not specifically challenge the factors the trial court cited in imposing the upper term. He focuses his argument on the reasons he believes the court should have granted probation.

DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.