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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MAHAMODOU BAYO, Defendant and Appellant.	B285684 (Los Angeles County Super. Ct. No. BA452576)

APPEAL from a judgment of the Superior Court of Los Angeles County, Terry A. Bork, Judge. Affirmed.

Christine M. Aros, 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, Shawn McGahey Webb and Shezad H. Thakor, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Mahamodou Bayo was convicted at trial of assault with a deadly weapon, and the jury found a great bodily injury allegation to be true. The court sentenced defendant to the midterm of three years, with a consecutive three-year sentence on the great bodily injury enhancement. On appeal, defendant asserts that the trial court erred by imposing the midterm, rather than a lesser term based on what defendant asserts are mitigating factors. We find no error and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On January 12, 2017, The Los Angeles County District Attorney (the People) filed an information charging defendant with a single count of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1),[1] a felony). The information alleged that on December 13, 2016, defendant assaulted A.B.[2] with a metal pole, inflicting great bodily injury. (§ 12022.7, subd. (a).) Defendant pled not guilty. The case proceeded to a jury trial.

A. Trial

Los Angeles Police Department officers William Norcross and Abel Munoz testified that they responded to a call at the Temple Recycling Center around 4:00 p.m. on December 13, 2016. They encountered victim A.B., whose elbow had been bandaged by paramedics; he was distraught and appeared to be in pain. A.B. described defendant as the person who injured him, and Munoz recognized the description as someone he had encountered before. The officers and A.B. left the recycling center to look for

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[1]All further statutory references are to the Penal Code unless otherwise indicated.

[2]We refer to the victim by initials to protect his privacy. (See Cal. Rules of Court, rule 8.90(b)(4).)

the perpetrator. They saw a shopping cart with a metal pole sticking out of it, and defendant was lying down near the shopping cart. A.B. identified defendant as the man who hit him, and the pole as the weapon. Defendant saw the police car and began to walk away; the officers stopped the car and told defendant to stop. As Norcross moved to handcuff defendant, defendant began to run away. The officers chased defendant, caught him, and took him into custody. They booked the metal pole into evidence. Norcross brought the pole to trial, and it was marked as an exhibit.

The officers then returned to the recycling center and were shown a surveillance video of the incident. When he was apprehended, defendant was wearing clothing that matched the clothing visible in the surveillance video. The video was played for the jury. On cross-examination, Norcross said he was not sure if the pole from the shopping cart was the same metal pipe used in the attack; on redirect, he said the pole matched the size and shape of the pole in the surveillance video.

Witness Antonio Lopez testified that he worked as an attendant at the recycling center where the incident occurred. He had seen defendant at the recycling center about 50 times before. He said that on December 13, 2016, a man was waiting in line to have his recycling weighed. Defendant "didn't want to wait his turn" and "cut in front of" the other man. The men started arguing using "bad words"; "they argued, and [defendant] took the pipe and hit" the other man. Lopez said he then got "in the middle" of the two men, because defendant "was going to take a blow again. He was going to hit him again." Defendant left, and employees called the police. Defendant had a shopping cart with him, and as he left the metal pole was in the shopping cart.

The man who had been hit was bleeding from the elbow. Paramedics came and treated him.

Lopez testified that "sometimes we had to kick [defendant] out [of the recycling center] because he always takes out a bat or something, or something to hit with," but "he hadn't actually hit anybody like this time. This time he hit."

Victim A.B. testified that he had been disabled for ten years. He went to the Temple Recycling Center on December 13, 2016 to turn in his recycling. The surveillance video was played in portions, and A.B. testified as to what was happening in the video. A.B. was in line, and defendant was standing off to the side. Defendant cut in front of A.B., and they began to argue. A.B. told defendant to go ahead of him, but defendant was still very angry. A.B. testified that defendant retrieved "[h]is weapon, that metal bar" from his shopping cart, "[a]nd then, he got crazy and he attacked me with that." Defendant was yelling as he approached A.B. with the pole, and A.B. was scared. As defendant swung the pole at A.B.'s face, A.B. put his left arm up to protect himself. The pole hit A.B.'s left elbow "really hard," and it hurt "very much."

A.B. began to back up, because he was afraid defendant would hit him again. Defendant continued to advance. As the attendant came toward the two men, defendant ran away, taking the pole with him. A manager called 911. Police and paramedics arrived, and wrapped A.B.'s elbow in gauze. The wound bled through the first bandage, and so the bandage was replaced. A.B. went with officers to attempt to locate defendant. They found defendant nearby, with his shopping cart and the metal pole.

A.B. testified that he went to the hospital after the incident; his injuries required surgery. A.B. was admitted to the

hospital, and the following day he underwent surgery to insert a metal plate. A.B. was in a cast for eight weeks, and then he completed physical therapy. A.B. said that at the time of trial in June 2017, he could not lift heavy objects, his mobility was limited, he could not straighten his arm all the way, and the elbow "gets stiff all the time."

Orthopedic surgeon Benjamin Song testified that he treated A.B.'s injured arm. He characterized A.B.'s fractured elbow as a "[v]ery bad injury" with multiple fragments of the olecranon bone, the bony tip of the elbow. Dr. Song performed the surgery to repair the elbow, which required putting the bone fragments back together and fixing them in place with a plate and multiple screws. Dr. Song said that ongoing effects were inevitable from that kind of injury. He also said that the elbow bone is strong, and it would take a great amount of force to break it.

The defense did not present any evidence, and rested. The jury found defendant guilty, and found the great bodily injury enhancement true.

B. Sentencing

Defense counsel asked the court what it was inclined to do regarding sentencing. The court said it wanted time to look at the probation report, and asked the prosecutor what sentence she was planning to seek; she replied, "Mid term plus three years consec." The court set a date for a further hearing.

Defendant filed a sentencing memorandum requesting that defendant be screened for a diversion program, sentenced to 365 days of jail and probation, or sentenced to two years in prison with sentencing stayed on the great bodily injury allegation. Defendant argued that he had been "battling addiction issues"

most of his life, and would benefit from a substance abuse program. Defendant asserted that there were two mitigating factors: he had no prior felony convictions, and he suffered from mental health issues, including auditory hallucinations and paranoid delusions.

The defense submitted a letter by Risa Grand, M.D., summarizing an assessment of defendant that was completed shortly before trial. Dr. Grand said defendant suffered from substance abuse disorder with multiple drugs and "heavy methamphetamine use," but there was "no evidence of a formal thought disorder" or ongoing psychosis. Defendant had never seen a psychiatrist in the past, and he did not consider himself mentally ill. Dr. Grand opined that defendant would benefit from a substance abuse treatment program.

The People submitted a sentencing memorandum noting that defendant was ineligible for probation under section 1203, subdivision (e)(3).[3] The People argued that the crime involved a high degree of viciousness and callousness, in that defendant swung a heavy metal pole at A.B.'s head, and would have hit him again had Lopez not intervened. The People also asserted that the victim was older, smaller, and vulnerable, and that defendant chose to attack A.B. even after A.B. allowed defendant to go before him in line. In addition, Lopez testified that defendant had acted threateningly toward others in the past. The people

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[3]Section 1203, subdivision (e)(3), states that "[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 . . . in the perpetration of the crime of which he or she has been convicted."

agreed that defendant did not have other felony convictions, and therefore requested the midterm rather than the maximum.

At the sentencing hearing, the court noted that "the probation officer's recommendation in this case is a diagnostic study pursuant to 1203.03." The prosecution, noting that the weapon used was a heavy, five-foot fence pole that defendant swung at A.B.'s head, argued that A.B. had been traumatized by the attack and would never again have full use of his left arm. The prosecutor also pointed out that defendant attempted to evade the police, and that drug addiction is not a mitigating factor. The prosecutor noted that defendant had been sentenced to probation on two misdemeanors in the past, and never sought treatment for his drug addiction.

Defense counsel argued that A.B. was already disabled before the incident, so the injury did not cause him to lose work. She argued that treatment programs were not available for misdemeanor convictions, and that defendant had a mental illness that required treatment. Counsel noted that this was defendant's first felony conviction. She asked that defendant "at least [have] the opportunity to be screened." The prosecutor noted, "[W]e've already had a doctor evaluate the defendant and we don't even have a diagnosed mental illness."

The court stated, "This is a case where the court would benefit from the opinion of the diagnostic study which is recommended by the probation officer, and I agree with that recommendation." The court therefore ordered a diagnostic study under section 1203.03, and the court set a new sentencing hearing date.

A diagnostic study was completed August 14, 2017. The evaluation report stated that defendant was "an unsuitable

candidate for probation." The evaluation noted that defendant had a history of several arrests, and stated that defendant "is criminally oriented and has established a criminal behavior pattern. It is believed, if he were granted probation and fails, he would present a significant risk to the community." It also noted that "previous grants of probation have not altered his behavior." It recommended that defendant be sentenced to "a term as set forth by the Court."

At the sentencing hearing, the prosecution argued that the study showed that defendant did not suffer from any mental illness, and recommended the midterm sentence of three years with three additional years for the great bodily injury enhancement. Defense counsel asked that defendant participate in a diversion program with mental health treatment.

The court said, "Neither the probation officer nor the corrections department recommends a grant of probation in this case, nor do the People. I note in the Corrections Department memo that [defendant] is criminally oriented and has established a criminal behavior pattern. It is believed, if he is granted probation and fails, that he would present a significant risk in the community." The court said that defendant is "presumptively ineligible for probation" under section 1203. The court noted that "there are no mitigating factors which overcome the presumption and make probation an appropriate sentence in this case." The court also stated that "there are aggravating factors which makes the minimum term inappropriate." The court continued, "The defendant's crime involves violence, great bodily harm, and a high degree of callousness. The defendant was armed with a deadly weapon. The victim was vulnerable in that he was older and smaller than the defendant and was unarmed when the

attack occurred and occurred in a place where one wouldn't expect it to occur. And the defendant is violent and poses a danger to the safety of others. I don't see any mitigating factors per rule 4.423(a) or (b) in this case." The court concluded that this "is not a probation case. It is a prison case." Due to the aggravating factors, the lower term was not appropriate, and therefore, "It's a mid term case, and that's what I will do." The court sentenced defendant to three years in prison, with a consecutive three years for the great bodily injury allegation, for a total of six years.

Defendant timely appealed.

DISCUSSION

Assault with a deadly weapon is punishable by a prison term of two, three, or four years. (§ 245, subd. (a)(1).) "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." (§ 1170, subd. (b).) We therefore review such a sentencing decision for abuse of discretion. "'The 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.)

Defendant argues on appeal that the trial court abused its discretion by imposing the midterm sentence of three years because "there were numerous mitigating factors warranting an alternative to prison, or, at least, a lower term." He also asserts that the court "abused its discretion in weighing the aggravating

and mitigating circumstances." The People assert that defendant forfeited his claim by failing to object below, and that the court properly exercised its discretion.

We consider forfeiture first. The People are correct that defendant has forfeited his contentions that the court erred by failing to appropriately consider aggravating and mitigating factors. The Supreme Court has held that "the waiver doctrine should apply 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, and cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons." (*People v. Scott* (1994) 9 Cal.4th 331, 353.)

In his reply brief, defendant acknowledges that he "did not specifically object to the court's reliance on improper factors in imposing the term." He argues that nonetheless, his request for a lower sentence constituted an objection. We disagree. After the parties filed their sentencing memoranda and argued their positions before the court in two different hearings, the court articulated its reasons for selecting the midterm. Defendant now asserts that the court's stated reasons were inappropriate, but he did not object to them at the time the court articulated them. Had he objected at the time, the court could have corrected the purported error. "Applying the [forfeiture] rule to appellate claims involving discretionary sentencing choices . . . is appropriate, because characteristically the trial court is in a considerably better position than the Court of Appeal to review and modify a sentence option . . . that is premised upon the facts

and circumstances of the individual case." (*In re Sheena K.* (2007) 40 Cal.4th 875, 885.) As such, defendant's failure to object forfeits his claims that the court's reasons for imposing the midterm were erroneous.

Even if the claims had not been forfeited, however, there was no error. Defendant acknowledges that he was ineligible for probation, but asserts that due to mitigating factors, "an alternative sentencing option, or at least a lower term, was more appropriate." California Rules of Court, rule 4.423 sets out mitigating factors to consider in sentencing, including whether the defendant has a prior record (rule 4.423(b)(1)), whether the defendant "was suffering from a mental or physical condition that significantly reduced culpability for the crime" (rule 4.423(b)(2)), if the defendant was eligible for probation (rule 4.423(b)(4)), and any prior performance on probation (rule 4.423(b)(6)).

Defendant asserts that he had "an insignificant record of criminal conduct, with no prior felonies, and based on his drug use, it appears he was suffering from a mental or physical condition that significantly reduced [his] culpability for the crime." He argues that the court erred in stating that there were no mitigating factors. However, the court's statement is supported by the evidence. Defendant has a history of prior criminal conduct because he has misdemeanor convictions. In addition, there was no evidence suggesting that defendant's drug use rendered him less culpable for the assault on A.B. Thus, the court did not err in stating that there were no mitigating factors that warranted a lower term here.

California Rules of Court, rule 4.421 sets out aggravating factors, which include that the crime involved great bodily harm (rule 4.421(a)(1)), the defendant used a weapon in the commission

of the crime (rule 4.421(a)(2)), the victim was particularly vulnerable (rule 4.421(a)(3)), the defendant is a danger to society (rule 4.421(b)(1)), defendant's convictions are increasing in seriousness (rule 4.421(b)(2)), and defendant's prior performance on parole was unsatisfactory (rule 4.421(b)(5)). "The trial court is not limited to the aggravating circumstances listed in the rules." (*People v. Black* (2007) 41 Cal.4th 799, 817.) "One aggravating factor is sufficient to support the imposition of an upper term." (*People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1371.)

Here, the court identified multiple aggravating factors, including that the "victim was vulnerable in that he was older and smaller than the defendant and was unarmed when the attack occurred," and "defendant is violent and poses a danger to the safety of others." Defendant does not assert that the trial court erred by considering these factors. These factors alone were sufficient to warrant imposition of a midterm sentence.

The parties agree that the trial court improperly cited some aggravating factors that were also elements of the crime. While discussing aggravating factors, the court stated that the crime involved violence, great bodily harm, and use of a deadly weapon. "A fact that is an element of the crime on which punishment is being imposed may not be used to impose a particular term." (Cal. Rules of Court, rule 4.420(d).) Because the defendant was convicted of a violent assault with a deadly weapon and was sentenced on the great bodily harm enhancement, it was improper for the court to rely on these facts as aggravating factors. Nevertheless, the existence of a single aggravating circumstance will support the imposition of a higher term, even if the trial court has also articulated improper factors. (*People v. Osband* (1996) 13 Cal.4th 622, 728.) That the court

relied on some improper factors while also relying on proper aggravating factors does not warrant remand for resentencing. (See *People v. Scott, supra,* (1994) 9 Cal.4th at p. 355 [errors in articulating sentencing choices do not require remand where "the error [is] nonprejudicial, i.e., it is 'not reasonably probable that a more favorable sentence would have been imposed in the absence of the error.'"].)

DISPOSITION

The judgment is affirmed.

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COLLINS, J.

We concur:

MANELLA, P. J.

WILLHITE, J.