

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

VANCE TERENCE HARRIS,

Defendant and Appellant.

B230121

(Los Angeles County
Super. Ct. No. PA066698)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Burt Pines, Judge. Affirmed.

Kimberly Howland Meyer, 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, Stephanie C.
Brenan and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and
Respondent.

INTRODUCTION

A jury convicted defendant Vance Terence Harris of the carjacking (§ 215, subd. (a))¹ and robbery (§ 211) of 93-year-old Clement Fletcher and found in regard to each crime that defendant had personally inflicted great bodily injury on a victim 70 years of age or older (§ 12022.7, subd. (c)). On the carjacking conviction, the trial court selected the nine-year upper term and imposed a consecutive five-year sentence for the great bodily injury enhancement for a total sentence of 14 years. Pursuant to section 654, the court stayed imposition of sentence on the robbery conviction.

In this appeal, defendant does not contest the sufficiency of the evidence to sustain any of the jury's findings. Instead, he contends that the trial court's selection of the upper term for the carjacking conviction was improper for two reasons. First, he claims that "the trial court impermissibly relied on an element of the substantive offense to impose the upper term": to wit, force and violence. Second, he argues that the trial court's decision to impose the upper term based upon its finding that the victim was particularly vulnerable improperly relied upon the same facts found by the jury to support the section 12022.7, subdivision (c) enhancement. We are not persuaded by either argument and therefore affirm the judgment.

STATEMENT OF FACTS

During the morning of February 2, 2010, 93-year-old Clement Fletcher had breakfast by himself at Carrows Restaurant. Afterwards, he walked alone to his car in the restaurant's parking lot. It was between 7:30 and 8:00 a.m. His car was parked in an area that could not be seen from the restaurant. Fletcher placed his

¹ All statutory references are to the Penal Code.

key in the car door and unlocked the vehicle. While Fletcher was opening the door, defendant pushed him. Fletcher “flew” “through the air,” landing on his back and bumping his head on a concrete stop. Defendant searched through Fletcher’s pockets and then tried to grab the car keys out of Fletcher’s hands. Fletcher resisted as the two men “kept rolling and fighting around.” Defendant held Fletcher’s head, repeatedly shaking it and banging it against the ground and the concrete stop. Fletcher hollered “help” as “loud as [he] could holler,” “probably . . . a dozen times or more” “but nobody came.” At one point, defendant had his knees on Fletcher’s chest. Fletcher punched defendant. Fletcher let go of the keys after defendant bit his hand. Defendant entered Fletcher’s car and drove away. Fletcher lay on the ground “for a little while, . . . trying to get [his] senses back, and then [he] finally got up and staggered into the restaurant.”

Fletcher was transported to the hospital emergency room. He sustained multiple injuries to his face, hands and arms as a result of defendant’s attack, some of which required stitches.

The day after the attack, the police arrested defendant while driving Fletcher’s car.

Defendant testified at trial that he had, without permission, “borrowed” the car (which he did not realize was stolen) from “Adam,” “a known gang banger.” Defendant denied having forcibly taken the car from Fletcher.

DISCUSSION

1. Factual Background

At the beginning of the sentencing hearing, the court indicated that it intended to impose the upper term for the carjacking conviction (§ 215, subd. (a)). It explained:

“First, it’s the court’s view that this sentence serves the general objectives of sentencing, which include protecting society; punishing the defendant; encouraging the defendant to lead a law-abiding life in the future; and deterring him from future offenses; deterring others from criminal conduct by demonstrating its consequences; preventing the defendant from committing new crimes by isolating him for the period of incarceration; and achieving uniformity in sentencing.

“In addition, *in the court’s view, based on the evidence here, this crime involved great violence and other acts disclosing a high degree of cruelty, viciousness, and callousness.*

“Carjacking, as you know, can be committed in many different ways, from a simple demand and acquiescence to the use of a gun to brutal acts, which I believe were committed here. *So in my view this is an aggravated form of carjacking.*

“In addition, the victim was particularly vulnerable. I realize that the enhancement applies to someone who is 70 and over, but this man was 93. And I saw him on the witness stand and observed him. Some people characterize him as tough because he resisted, but in my view he was particularly vulnerable.

“In addition, the defendant has engaged in violent conduct that indicates a serious threat to society. *As I indicated earlier, carjacking can be conducted in many different ways. Sometimes just using fear is enough, but here your client used force and violence.* So those are the reasons that – each of them standing alone, for imposing the high term.” (Italics added.)

Defense counsel objected, arguing that the trial court was improperly using dual facts to select the upper term. She argued that the facts the trial court had cited were “either within the definition of carjacking or are covered by the enhancement.”

The trial court disagreed, stating that it had “explained . . . in sufficient detail why [it] believe[d] the factors [it had] enunciated are not within the definition of either carjacking or the enhancement per se.”

Immediately before pronouncing judgment, the trial court reiterated its reasoning as follows:

“The first reason would be the general objectives of sentencing; the second reason was the great violence involved here; the third reason was the vulnerability of the victim; and the fourth reason was the fact that the defendant engaged in violent conduct and is a serious threat to society.”

The trial court imposed the nine-year upper term for the carjacking conviction (§ 215, subd. (a)), plus a five-year consecutive sentence for the enhancement (infliction of great bodily injury enhancement upon a victim 70 years or older; § 12022.7, subd. (c)). In regard to the robbery conviction (§ 211), the court selected the five-year upper term and imposed a five-year consecutive sentence for the section 12022.7, subdivision (c) enhancement but, pursuant to section 654, stayed imposition of that 10-year sentence, finding “that the objective and intent in both these counts were the same.”

2. Legal Background

“[A] trial court is free to base an upper term sentence upon any aggravating circumstance that the court deems significant, subject to specific prohibitions. (See, e.g., Cal. Rules of Court, rule 4.420(c) [fact underlying an enhancement may not be used to impose the upper term unless the court strikes the enhancement]; *id.*, rule 4.420(d) [fact that is an element of the crime may not be used to impose the upper term].) 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.’ (Cal. Rules of Court, rule 4.408(a).)” (*People v. Sandoval* (2007) 41 Cal.4th 825, 848.)

California Rules of Court, rule 4.421 identifies aggravating circumstances the trial court can consider. Aggravating factors relating to the crime include: “(1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness; [¶] . . . [¶] (3) The victim was particularly vulnerable.” (Cal. Rules of Court, rule 4.421(a)(1) & (3).) Aggravating factors relating to the defendant include: “(1) The defendant has engaged in violent conduct that indicates a serious danger to society.” (Cal. Rules of Court, rule 4.421(b)(1).)

3. Analysis – The Trial Court Did Not Improperly Rely Upon an Element of the Offense to Impose the Upper Term

In this case, the trial court found that defendant’s commission of the carjacking involved great violence. The record amply supports this finding. Defendant attacked Fletcher from behind, throwing him into the air. Fletcher landed on his back, injuring his head on the concrete. Fletcher resisted defendant as defendant tried to grab his car keys. Defendant held Fletcher’s head, repeatedly banging it against the concrete. Defendant placed his knee on Fletcher to restrain him. Defendant gained possession of Fletcher’s keys only after he bit Fletcher’s hand. In sum, the evidence supports the trial court’s findings that defendant’s “brutal acts” in committing the carjacking disclosed “great violence” and “a high degree of cruelty, viciousness, and callousness,” and that defendant “engaged in violent conduct that indicates a serious threat to society.”

Defendant seeks to avoid this conclusion by arguing that “no more force was used than was necessary to obtain the car keys.” We are not persuaded. “[W]here the facts surrounding the charged offense exceed the minimum necessary to

establish the elements of the crime, the trial court can use such evidence to aggravate the sentence.” (*People v. Castorena* (1996) 51 Cal.App.4th 558, 562.) Contrary to what defendant suggests, a violent and vicious assault such as the one that he inflicted upon Fletcher is not an element of carjacking.

Because carjacking requires the taking of the car “by means of force *or fear*” (§ 215, subd. (a), italics added), a defendant need not engage in violent conduct in order to commit the crime. *People v. O’Neil* (1997) 56 Cal.App.4th 1126 illustrates that point. There, the defendant, without the victim’s knowledge, entered the victim’s empty vehicle that was parked in the driveway. The victim, inside his home, saw this, ran outside, confronted the defendant, and grabbed onto his vehicle. After the defendant angrily screamed profane language at him, the fearful victim relinquished the vehicle. These facts (abusive language causing fear in the victim) were sufficient to establish a carjacking. (*Id.* at p. 1132.) Further, it has been held that “the victim need not be consciously aware that the defendant is using force or fear to take possession of the vehicle for a conviction under Penal Code section 215 to stand. (*People v. Hill* [(2000) 23 Cal.4th 853], 860-861 [infant may be victim of carjacking].)” (*People v. Magallanes* (2009) 173 Cal.App.4th 529, 534.)

Based upon these precedents, we conclude that defendant’s actions exceeded the minimum necessary to commit a carjacking. Therefore, the trial court did not improperly use an element of carjacking to select the upper term.

4. *Analysis – The Trial Court Did Not Improperly Rely Upon an Element of the Enhancement to Impose the Upper Term*

Section 12022.7, subdivision (c) provides, in relevant part: “Any person who personally inflicts great bodily injury on a person who is 70 years of age or older . . . in the commission of a felony . . . shall be punished by an additional and

consecutive term of imprisonment in the state prison for five years.” Defendant does not contest that substantial evidence supports the jury’s findings on the enhancement’s predicate elements. Instead, defendant argues that “the trial court’s reliance on [Fletcher’s] age and the fact that [Fletcher] suffered great bodily injury to aggravate [defendant’s] sentence and impose the five-year enhancement violated” the prohibition against using the same facts to impose both an upper term and a sentence enhancement. We disagree for several reasons.

To begin, defendant’s characterization of the trial court’s statement of reasons for selecting the upper term is not accurate. While the trial court did refer to the “great violence” involved in defendant’s commission of the carjacking as a reason to impose the upper term, the court never referred to the great bodily injury inflicted on Fletcher by defendant as a reason to select the upper term. Instead, the court simply twice noted that the 93-year-old Fletcher “was particularly vulnerable.” As set forth above, California Rules of Court, rule 4.421(a)(3) provides that the upper term can be imposed when the “victim was particularly vulnerable.” “‘Particularly . . . means in a special or unusual degree, to an extent greater than in other cases. *Vulnerability means defenseless, unguarded, unprotected, accessible, assailable, one who is susceptible to the defendant’s criminal act.*’ [Citation.]” (*People v. Loudermilk* (1987) 195 Cal.App.3d 996, 1007, italics added.)

If, as here, a victim’s age is an element of the enhancement, the trial court may not rely solely upon the victim’s age to support a finding of particular vulnerability in order to impose the upper term. (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 195, including fn. 6.) However, if the record reveals circumstances in addition to age that rendered the victim particularly vulnerable, there is no improper dual use of facts. (*Ibid.*) In this case, those circumstances are present. Fletcher walked alone to his car in the early morning. His car was parked

in an area not visible from the restaurant. The area was sufficiently isolated that apparently no one heard any of Fletcher's many cries for help because no one came to his aid. Further, defendant physically restrained Fletcher from escaping as he sought to take the car keys from him. Under these circumstances, the record fully supports the trial court's decision to impose the upper term based upon the victim's particular vulnerability. That the trial court did not recite these facts does not change our conclusion. In light of the numerous facts that rendered Fletcher vulnerable, "a remand would be unnecessary even if it were error to cite [only] [Fletcher's] age. . . . [W]e do not find it reasonably probable the court would reach a different conclusion in finding the victim vulnerable or imposing an aggravated term. [Citations.]" (*Id.* at pp. 195-196.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.