Filed 9/6/12 P. v. Smith CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. STEVEN JON SMITH, Defendant and Appellant.	2d Crim. No. B232525 (Super. Ct. No. F440137) (San Luis Obispo County)

Steven Jon Smith appeals a judgment following conviction of attempted voluntary manslaughter, with findings that he personally used a firearm during commission of the crime and personally inflicted great bodily injury upon the victim. (Pen. Code, §§ 664, 192, subd. (a), 12022.5, subd. (a), 12022.7, subd. (a).)[1] We affirm.

FACTS AND PROCEDURAL HISTORY

In October 2008, 25-year-old Smith met Gina Stanko, a 33-year-old single mother of five children, at a bar in Paso Robles. They later communicated through an Internet social site, and in November or December, their relationship became physically intimate. Over the next several months, Smith visited Stanko at her Via Promesa residence. Smith informed Stanko that he had a female roommate, Renee Coppini, who

[1] All further statutory references are to the Penal Code. References to sections 12022.5 and 12022.7 are to versions in effect prior to repeal effective January 1, 2012.

was a former girlfriend. In fact, Smith and Coppini were engaged, and were married by the time of trial.

In late February or early March 2009, Stanko learned that she was pregnant. She informed Smith and his sister Stephanie, who in turn informed Coppini. In conversations with Stanko, Smith "would go back and forth" concerning his willingness to raise and support the child. Smith also encouraged Stanko to consider an abortion.

On one occasion, Stanko visited Smith's workplace to discuss genetic testing of the unborn child. Afterward, Smith described Stanko as a "lying whore" to his sister. Stephanie informed Stanko of the insult and Stanko later confronted Smith and slapped him.

Stanko discussed payment of her medical bills and child support with Smith and his father. Smith initially offered to provide support for Stanko and her child, but did not follow through. Stanko became angry with Smith, belittled him and his family, and sent him hostile and profane text messages because "he didn't step up to the plate."

During Stanko's pregnancy, Coppini was repeatedly harassed by a woman claiming to be Stanko's friend. The woman visited Coppini several times and the visits ended in physical altercations. The friend also left telephone messages for Coppini stating, "Gina's out to get you. You'd better just watch your back."

In the morning of November 6, 2009, Coppini sent a text message to Smith stating: "I can't take this anymore. I'm giving my notice." Smith replied, "No. It's going to happen today. I promise. It's the last of the stressing." Smith later sent Coppini a text message stating that he would return home that evening after an outing with fellow football coaches. Coppini replied: "Nope. Don't bother. I will be asleep. I don't care anymore."

Stanko also sent text messages to Smith that day as well as an angry and profane voicemail demanding that he pay child support and threatening that she would obtain a court order for support. She stated in part: "I'm just gonna go to the District Attorney or if I have to hire an Attorney, fine, . . . but there's no way you're getting away with this."

That evening, Smith and Stanko continued to send text messages to each other. In one exchange, Smith confirmed that Stanko was home alone.

Stanko then heard the sound of Smith's truck. She sent him a text message asking if he was outside her home. He replied that he was not. When the doorbell rang, however, Stanko opened her door and saw Smith standing there.

Smith entered the home and sat on a sofa in the living room. They discussed a football game that he had coached that evening, and then Smith asked Stanko to "lie down flat so [he could] love [her]." Smith lay on top of Stanko and attempted to push a pillow over her face. Stanko resisted and tried to push him away. Smith then pulled a gun and shot Stanko in the chin. Stanko demanded that he leave, but Smith shot her again in the forehead. Stanko screamed for her teenage daughter J. who was upstairs. J. came downstairs and saw Smith shoot her mother a third time. The third bullet struck Stanko's hand as she tried to protect herself. J. telephoned for police and medical emergency assistance as Smith left the home.

Stanko received emergency hospital treatment. By the time of trial, she had received five surgeries, including placement of a metal plate in her chin. As a result of the shooting, Stanko lost mobility in her thumb, and bullet fragments remain in her face and head.

When police officers arrested Smith at his residence, he stated: "I can't believe I did that. She kept harassing me. I--I just snapped." Inside Smith's truck, police officers found a .22 caliber Ruger handgun within a jacket. The handgun had one remaining hollow point bullet, a type of ammunition that causes greater injury. Smith's father had given him the handgun, which Smith had used for target practice.

In mid-November 2009, Stanko delivered a full-term baby. At trial, the parties stipulated that there is a 99.9 percent probability that Smith is the baby's biological father.

On December 20, 2009, during Smith's pretrial confinement, a correctional officer found a note on the floor in the area where Smith had been visiting with Coppini. The note stated: "We just have to figure out why you said it. Maybe because you were

stressed at work." The note referred to Coppini's text message regarding "giving [her] notice."

Smith testified that Stanko suggested that they become "friends with benefits," but after they became physically intimate, she threatened to visit his workplace and embarrass him. Smith stated that Stanko sent him text messages frequently, often threatening and profane. He also stated that he informed Stanko that he had a girlfriend. Smith described incidents where Stanko threatened and cursed him, slapped or pushed him, stalked him, threw objects at him, and chased him in her vehicle.

Smith testified that he went to Stanko's home the evening of November 6, 2009, to ask her to stop bothering him and Coppini. He stated that he decided to take his handgun for protection and conceal it in his clothing. He and Stanko argued and she began swinging at him. He pulled the handgun from his pocket and ordered Stanko to stop. She grabbed the gun and it accidentally fired. As he backed away from her, it accidentally fired again. Smith stated that he did not see J. in the home.

Smith presented evidence that Stanko was physically abusive and threatening to the biological fathers of her older children. The fathers described incidents where Stanko harassed them and their family members by profane telephone calls, automobile chases, and vandalism.

Smith also presented expert opinion evidence from Doctor Ellen Stein, a clinical and forensic psychologist with expertise regarding domestic violence. She opined that Smith suffered from intimate partner battery and thus did not believe he could escape his relationship with Stanko. Stein also concluded that Smith has a narcissistic and dependent personality that precludes his complaints of mistreatment.

The jury acquitted Smith of two counts of attempted murder and one count of burglary, but convicted him of attempted voluntary manslaughter. (§§ 664, 192, subd. (a).) It also found that he personally used a firearm during commission of the crime and personally inflicted great bodily injury upon the victim. (§§ 12022.5, subd. (a), 12022.7, subd. (a).)

Sentencing

On March 17, 2011, the trial court held a sentencing hearing. The trial judge stated that he received and read several hundred letters from members of the community, some supporting Stanko and others supporting Smith, as well as letters from three jurors urging leniency. Stanko spoke and described the physical and emotional injuries she suffered from the shooting and its impact upon her children. She urged imposition of the maximum sentence. Smith then read a statement referring to the shooting as an accident and asserting that he could serve the community better as a probationer than as a prisoner.

The prosecutor argued that aggravating circumstances of the crime warranted 18 years 6 months imprisonment, the maximum term. The defense attorney then argued that the unusual circumstances of the case warranted a grant of probation, relying on *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 825, 837, and California Rules of Court, rules 4.413 and 4.414.

The trial judge described the case as "extremely difficult" with the "sides [being] so polarized." He also stated that "[s]ometimes good people do very bad things," and referred to the Scott Peterson prosecution as a "most extreme example" that was "not much of a parallel" to Smith. The judge stated that he found credible Smith's admission that he "snapped" and shot Stanko. He then ruled that punishment should be aggravated because "in the court's opinion, Mr. Smith used a position of trust to enter someone's home. He went into someone's home . . . with a loaded gun. This is a man who was in very good condition, an accomplished athlete, and he's about to confront a woman who is eight and a half months pregnant that has five children. He shoots her in the face . . . three to five times after trying to get her in a compromising position."

The trial court sentenced Smith to a prison term of 12 years 6 months, consisting of a 5-year 6-month upper term for the attempted voluntary manslaughter conviction, a 4-year midterm for the personal firearm-use enhancement, and a 3-year term for the infliction of great bodily injury enhancement. The court imposed a $2,400 restitution fine and a $2,400 parole revocation restitution fine, ordered restitution to the victim, and awarded Smith 175 days of presentence custody credit.

Smith appeals and contends that: 1) the trial court abused its discretion in sentencing him to a 12-year 6-month prison term, and 2) his sentence violates the cruel and unusual punishment principles of the federal and California Constitutions.

DISCUSSION

I.

Smith argues that imposition of the upper term of imprisonment for attempted voluntary manslaughter violates his Sixth Amendment right to a jury trial. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 ["Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"].) He asserts that the jury "envisioned" the mitigated term, pointing out that three jurors wrote the trial court urging leniency, in part because "[Smith] has suffered enough already."

Smith also contends that the trial court abused its discretion in imposing a 12-year 6-month sentence because the sentence ignored the jury's findings. He asserts that the trial court improperly compared him to Scott Peterson, a man who with premeditation and deliberation "kill[ed] his wife and baby." Pointing to Stanko's continual physical and emotional harassment, Smith also argues that Stanko was not a particularly vulnerable victim, he was not in a position of trust to her, and the crime was not cruel or vicious, all aggravating factors stated by the court.

Smith has not established that he was denied his Sixth Amendment right to a jury trial or that the trial court abused its discretion in imposing sentence.

Pursuant to the amended determinate sentencing law, trial courts have discretion to select among the lower, middle, and upper terms specified by statute without stating ultimate facts deemed to be aggravating or mitigating circumstances. (§ 1170, subd. (b); *People v. Jones* (2009) 178 Cal.App.4th 853, 866.) Following the amendments, "a trial court is free to base an upper term sentence upon any aggravating circumstance that the court deems significant, subject to specific prohibitions." (*People v. Sandoval* (2007) 41 Cal.4th 825, 848.) Trial courts now have broad discretion in selecting a term within a statutory range, "thereby eliminating the requirement of a judge-found factual finding to

impose an upper term." (*People v. Wilson* (2008) 164 Cal.App.4th 988, 992.) In addition, when selecting sentence within the statutory available sentencing range, the court is not prohibited from considering evidence underlying charges of which defendant has been acquitted. (*People v. Towne* (2008) 44 Cal.4th 63, 70.)

Moreover, the trial court's exercise of discretion was not unreasonable. (*People v. Sandoval*, *supra*, 41 Cal.4th 825, 847 [trial court abuses its discretion if it relies upon irrelevant circumstances or improper reasons for its sentencing decision].) The trial judge briefly referred to Scott Peterson, but stated that crime was an "extreme example" that was "not much of a parallel" to Smith. The court also properly considered Stanko, nearly nine months pregnant, to be a particularly vulnerable victim. Smith encouraged Stanko to lie down on the sofa prior to shooting her, making it more difficult for her to defend herself. This factor alone justifies the court's selection of the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728-729.) The record also reflects that the court considered Smith's community involvement and support and his lack of a criminal record as mitigating factors. We do not substitute our judgment for that of the trial court in imposing sentence. (*People v. Jones*, *supra*, 178 Cal.App.4th 853, 861.)

II.

Smith contends that his 12-year 6-month sentence violates the cruel and unusual punishment principles of the federal and California Constitutions. (U.S. Const., 8th Amend.; Cal. Const., art. 1, § 17.) He relies upon *People v. Dillon* (1983) 34 Cal.3d 441, abrogated by statute on a different point as explained in *People v. Chun* (2009) 45 Cal.4th 1172, 1186, holding that a statutory punishment violates the California prohibition against cruel or unusual punishment if "it is grossly disproportionate to the offense for which it is imposed." (*Id.* at p. 478; *id.* at p. 478, fn. 25.) Smith asserts that a consideration of "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society" compels the conclusion that his sentence constitutes cruel or unusual punishment. (*Id.* at p. 479.) Among other things, Smith points out that the trial judge commented regarding Smith's contributions to the community and stated that he did not believe Smith would "go out and do this again."

For several reasons, we reject Smith's contentions.

First, Smith has forfeited this argument on appeal because he did not raise this objection to his sentence in the trial court. (*People v. Kelley* (1997) 52 Cal.App.4th 568, 583 [failure to raise cruel and unusual punishment contention forfeits issue on appeal].)

Forfeiture aside, the Eighth Amendment to the federal Constitution "contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'" (*Ewing v. California* (2003) 538 U.S. 11, 20 [sentence of 25 years to life for commercial burglary under California's three strikes law was not grossly disproportionate to the offense].) "A punishment violates the Eight Amendment if it involves the 'unnecessary and wanton infliction of pain' or if it is 'grossly out of proportion to the severity of the crime.'" (*People v. Retanan* (2007) 154 Cal.App.4th 1219, 1230.) The United States Supreme Court has noted that this principle is applicable only in the '"exceedingly rare'" and '"extreme'" case. (*Lockyer v. Andrade* (2003) 538 U.S. 63, 73; *People v. Meneses* (2011) 193 Cal.App.4th 1087, 1092.)

Punishment may violate article 1, section 17 of the California Constitution if '"it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.'" (*People v. Retanan*, *supra*, 154 Cal.App.4th 1219, 1230-1231.) The defendant bears the considerable burden of establishing that his sentence is unconstitutional. (*People v. Meneses*, *supra*, 193 Cal.App.4th 1087, 1092-1093 [only in the rarest of cases does a sentence constitute cruel and unusual punishment].) Decisions finding a disproportionate sentence are an '"exquisite rarity.'" (*People v. Em* (2009) 171 Cal.App.4th 964, 972.)

The court considers three factors in determining whether a defendant's punishment violates the Constitution. (*People v. Dillon*, *supra*, 34 Cal.3d 441, 478-480.) First, the court examines the nature of the offense and the offender with particular regard to the degree of danger each presents. Second, the court compares the challenged punishment with punishments for more serious crimes in the same jurisdiction. Third, the court compares the challenged punishment with punishments for the same offense in other

jurisdictions. (*In re Lynch* (1972) 8 Cal.3d 410, 425-429, superseded by statute on another ground as explained in *People v. Caddick* (1984) 160 Cal.App.3d 46, 51.) Here Smith does not discuss the intrastate and interstate comparison factors, which we view as a concession that his sentence withstands constitutional scrutiny on each basis. (*People v. Retanan, supra,* 154 Cal.App.4th at p. 1231.)

Smith has not established his considerable burden that the sentence is disproportionate to the nature of his offense and the offender. Smith took a loaded, concealed firearm to the home of a woman who was pregnant with his child. He fired the weapon three times at her face, the last in the presence of her teenage daughter. Rather than seek a protective order, Smith chose a violent and dangerous method to remedy a harassment problem. Although Smith's youth, lack of a criminal record, and positive community involvement are factors in his favor, they do not outweigh the substantial seriousness of the offense. (*People v. Gonzales* (2001) 87 Cal.App.4th 1, 17 ["The lack of a significant prior criminal record is not determinative in a cruel and unusual punishment analysis"].) For these same reasons, Smith's sentence is not grossly disproportionate within the meaning of the Eighth Amendment. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001 [life without parole sentence for possessing 672 grams of cocaine not cruel and unusual].)

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

John A. Trice, Judge

Superior Court County of San Luis Obispo

Diane E. Berley, 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, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Eric J. Kohm, Deputy Attorney General, for Plaintiff and Respondent.