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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. JONATHAN CARY, Defendant and Appellant.	B271286 (Los Angeles County Super. Ct. No. SA087131)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark T. Zuckman, Judge. Affirmed.

Christian C. Buckley, 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.

Appellant Jonathan Cary appeals from his convictions and challenges his sentences for attempted murder, assault with a deadly weapon and residential burglary. He contends that the prosecutor's remarks during closing argument concerning appellant's sanity, defense counsel, appellant's expert witness, and his temporary pro. per. status amounted to misconduct that undermined his defense and denied him due process and a fair trial. Appellant further complains that the court abused its discretion in sentencing when it considered improper aggravating factors and ignored mitigating evidence. We disagree and therefore affirm.

FACTUAL AND PROCEDURAL SUMMARY

David Ditlow, the victim in this case, is appellant's father. Appellant, who is almost 40 years old, lived with his mother until he was a pre-teen, and then lived with Ditlow for several years. Appellant has suffered from psychological and mental health issues throughout his life; appellant reported hearing voices and had delusions. In 2014, Ditlow and appellant shared an apartment. In April, 2014 according to Ditlow, appellant had been breaking the house rules, coming home drunk, and becoming belligerent. At Ditlow's request, appellant moved out of the apartment.

On the afternoon of April 17, 2014, Ditlow sent a text message to appellant indicating that appellant's Social Security card had arrived in the mail. They also spoke by telephone, and because Ditlow believed appellant was intoxicated, he instructed appellant to come to the apartment the next day when he was "straight." Several hours later, however, when Ditlow was taking a nap[1] in his bedroom, he was awakened by the sound of breaking glass. Ditlow got up, walked into the living room, and saw that appellant had smashed a chair through the sliding glass door and

[1] During this time, Ditlow was not working and suffered from chronic back pain and took medication for the pain every day.

was entering the apartment. Appellant immediately walked to the kitchen and grabbed a 10- to 11-inch kitchen knife and "started coming" at Ditlow. As he approached, appellant said "This is it. This time, it's all over for you now," and he began stabbing Ditlow in the head and chest. Although Ditlow attempted to defend himself and plead for help, appellant continued to attack him. Although appellant had stabbed his father in the head and the chest about 10 times, Ditlow survived.

An information charged appellant with attempted murder (Penal Code,[2] §§ 664, 187, subd. (a) (count 1)),[3] assault with a deadly weapon (§ 245, subd. (a)(1) (count 2)), and first degree residential burglary (§ 459 (count 3)). As to all counts, the information alleged that appellant inflicted great bodily injury on the victim (§§ 1203.075, subd. (a), 12022.7), and as to counts 1 and 3, that appellant used a deadly weapon (§ 12022, subd. (b)(1)).

During the trial, appellant presented the testimony of Dr. Rose Pitt, a forensic psychiatrist, who interviewed appellant and reviewed his mental health and medical records. Dr. Pitt opined that appellant had schizoaffective disorder. She described the symptoms and characteristics of the disorder, testified regarding the treatment, the impact of a patient failing to take medication and the effects of alcohol on a person suffering from the disorder. Based on a hypothetical question similar to the facts of this case, Dr. Pitt opined that appellant's behavior was consistent with someone experiencing symptoms of schizoaffective disorder.

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[2] Unless otherwise specified, subsequent statutory references are to the Penal Code.

[3] Shortly before trial the prosecution attempted to amend count 1 to alleged premeditated, willful and deliberate attempted murder, but the court denied the motion.

A jury found appellant guilty of all counts and found the special allegations true. The court sentenced appellant to a term of 13 years—the nine-year high term for count 1, plus four years on the enhancements. Pursuant to section 654, the court stayed the sentences on counts 2 and 3.

Appellant timely filed a notice of appeal.

DISCUSSION

Appellant asserts that he is entitled to a reversal because the prosecutor committed prejudicial misconduct during closing argument and the court erred in the sentence it imposed. We disagree.

I. Prosecutorial Misconduct Claims

Appellant contends that the prosecutor made four sets of improper comments: (1) remarks about appellant's sanity; (2) a critique of appellant's expert, Dr. Pitt; (3) a reference to appellant representing himself for a short period before trial; and (4) a comment about defense counsel's knowledge of appellant's sanity.

A. Background.

In 2015, the court postponed the trial while appellant's counsel pursued a defense of "not guilty by insanity" (NGI) defense. In November 2015, appellant decided that he wanted to act as his own counsel and after a psychiatric report revealed that he was competent to do so, the court granted appellant's request to appear pro. per. Several weeks later, however, appellant asked for reappointment of counsel because he was having difficulty preparing for trial. The case proceeded to trial in late February 2016. Ultimately, the matter did not proceed to trial as an NGI

case. Instead at trial, appellant asserted "mental impairment" as a defense to specific intent.[4]

During the closing argument, the prosecutor told the jury "[y]ou may be familiar with the phrase 'not guilty by reason of insanity.' This is not a trial about insanity or temporary insanity. If this were a trial about insanity or temporary insanity, the witnesses would be doctors on both sides. There would have been testing done." She noted that, had the trial been about insanity, the prosecution would have presented its own doctor, would have had the opportunity to examine the defendant and the trial would have involved "a lot" of experts "trying to decide whether or not the defendant was sane or not." In the prosecutor's opinion, "this [was] a regular guilt trial about a very serious crime that was almost a first-degree murder." The prosecutor also told the jury that defense counsel was going to argue that because appellant "may . . . have a mental illness . . . that means you [the jury] can't hold [appellant] responsible for what he did that day. But that's not true. And that's up for you to decide, what any mental condition he has, if any, had to do with his intent that day."

In closing, defense counsel argued that appellant did not harbor the requisite specific intent for attempted murder because of

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[4] The jury was instructed with CALCRIM No. 3428 "Mental Impairment" as a defense to specific intent under section 28: "You have heard evidence that the defendant may have suffered from a mental disease, defect or disorder. You may consider this evidence only for the limited purpose of deciding whether, at the time of the charged crime, the defendant acted with the intent or mental state required for that crime. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant acted with the required intent or mental state, specifically: An intent to kill in Count 1 and either an intent to kill or commit an assault with a deadly weapon in Count 3. If the People have not met this burden, you must find the defendant not guilty of those offenses."

his mental illness; she repeatedly told the jury that "[m]ental illness negates specific intent."

On rebuttal, the prosecutor stated that defense counsel was trying to distract the jury with the "mental illness issue" and reminded the jury that there were no jury instructions that indicated that mental illness *negated* specific intent. The prosecutor argued, "[t]his shouldn't be a trial about mental illness, but the defense wants it to be, because it's their only hope." The prosecutor later acknowledged, however, that when it was considering whether appellant had the specific intent to commit the crimes it could consider the fact that appellant had a mental illness. Near the end of her argument, the prosecutor also said, "[appellant] probably has some sort of mental illness. A lot of people have a mental illness. But that doesn't mean he's crazy. [Defense counsel] wants you to think that he's crazy and that he can't control himself." The prosecutor implored the jury not to "be distracted by [the mental illness evidence]."

The prosecutor also observed that appellant was a pro. per. for a time in this case and explained, "[t]hey do not let people represent themselves for a day, a week, or a month, if they are not competent to represent themselves. And not just competent because they know what's going on, but competent, understanding the legal process." Defense counsel objected to the reference to appellant's pro. per. status, and the court sustained the objection and admonished the jury that it must "disregard the prosecutor's former statement about a judge allowing a defendant to represent himself. That's not part of your consideration. That's not evidence before you and you are to draw no conclusions as to whether or not the defendant is or was competent, which is a totally different issue than the issues before you."

The prosecutor also argued that Dr. Pitt was not a credible witness because she never treated appellant, did not consult his

treating physicians or people familiar with him in forming her opinion, and did not conduct testing. The prosecutor criticized the manner in which Dr. Pitt recorded her interview notes and prepared her report.

Later in her rebuttal, the prosecutor remarked that "[defense counsel] knows that [appellant] is not insane." Appellant's counsel objected. And after sustaining the objection, the court admonished the jury that "[t]he personal opinion of a lawyer is not relevant in any regard. Whether she thinks her client is sane or insane or guilty or not guilty, or whether the prosecutor thinks the defendant is guilty or not guilty or sane or insane, is not important. It's ultimately up to you to determine what the evidence is."

After the jury had begun deliberations, defense counsel moved for a mistrial. She argued that the prosecutor's references to appellant's sanity, and prior pro. per. status were improper misconduct. The court, disagreed and denied the motion.

B. Analysis

Under the federal Constitution, conduct by a prosecutor that does not result in the denial of specific constitutional rights but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action so infected the trial with unfairness as to make the resulting conviction a denial of due process. (*People v. Harrison* (2005) 35 Cal.4th 208, 242.) Less egregious conduct may nonetheless constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to attempt to persuade the court or jury. (*Ibid*.)

If a prosecutorial misconduct claim is based on the prosecutor's arguments to the jury, this court considers how the statement would, or could, have been understood by a reasonable juror in the context of the entire argument and determine whether there is a reasonable likelihood that the jury construed or applied

any of the complained-of remarks in an objectionable fashion. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) "In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*People v. Frye* (1998) 18 Cal.4th 894, 970, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Indeed," ' "the prosecution has broad discretion to state its views as to what the evidence shows and what inferences may be drawn therefrom." ' [Citation.]" (*People v. Welch* (1999) 20 Cal.4th 701, 752.)

First, the prosecutor's arguments about appellant's sanity and impairment defense do not amount to prosecutorial misconduct. The prosecutor did not misstate the law or the process by which an NGI case is presented at trial. (See § 1026; *People v. Hernandez* (2000) 22 Cal.4th 512, 520 [describing the trial process of an NGI case].) Likewise the prosecutor's argument on the mental impairment evidence as it related to specific intent was not improper and did not undermine appellant's defense. (See *People v. Vieira* (2005) 35 Cal.4th 264, 292; § 28, subd. (a) [holding that evidence of a mental disorder shall not be admitted to negate the capacity to form any mental state; such is admissible solely on the issue of whether or not the accused actually formed a required intent when a specific intent crime is charged].) Rather, the prosecutor's argument clarified the legal issues at stake by providing an analytical framework for the mental illness issue that was before the jury and by explaining what is not at issue—an NGI defense. The prosecutor's argument was also fair given that the defense lawyer argued to the jury that if it found appellant suffered from a mental illness it *must* find he lacked the specific intent to commit the crimes. (See *People v. Cummings* (1993) 4 Cal.4th 1233, 1302, fn. 47 ["An argument which . . . point[s] out that the defense is attempting to confuse the issues and urges the jury to

focus on what the prosecution believes is the relevant evidence is not improper."].)

Moreover, contrary to appellant's argument on appeal, the prosecutor acknowledged that evidence existed that appellant may have suffered from a mental illness or disorder. Given the latitude afforded in closing arguments, the prosecutor's comments were not improper.

Second, with respect to the prosecutor's critique of Dr. Pitt, appellant did not object to this line of argument in the trial court, and thus he forfeited his claim of prosecutorial misconduct. (*People v. Riggs* (2008) 44 Cal.4th 248, 298 [" ' "[A] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]" ' "].) Appellant's arguments fail on the merits as well. "Although prosecutorial arguments may not denigrate opposing counsel's integrity, 'harsh and colorful attacks on the credibility of opposing witnesses are permissible. [Citations.]' [Citation.] Moreover, a prosecutor 'is free to remind the jurors that a paid witness may accordingly be biased and is also allowed to argue, from the evidence, that a witness's testimony is unbelievable, unsound, or even a patent "lie." ' [Citations.]" (*People v. Parson* (2008) 44 Cal.4th 332, 360, italics omitted.) The prosecutor's arguments focused on the evidentiary reasons why the jury should not trust the opinions of Dr. Pitt. Comments about Dr. Pitt's methods of evaluation of appellant, her assessment of appellant's mental health issues and her preparation of her reports were a fair critique of her credibility. Finally, on the prosecutor's reference to appellant's prior pro. per. status, we agree that the comment was improper, but any misconduct was cured by the court's admonishments to the jury to disregard it. Similarly, the

prosecutor's comment about defense counsel's awareness of appellant's sanity was remedied by the court's instruction to the jury. In reaching this conclusion, we do not agree that these comments were likely to have been construed by the jury as an attack on defense counsel's personal integrity. Instead, the prosecution's remarks were likely interpreted as "an admonition not to be misled by the defense interpretation of the evidence, rather than as a personal attack on defense counsel." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1002-1003.)

In sum, none of the prosecution's comments appellant assails on appeal warrant reversal; the jury was not likely to have construed the comments in an objectionable manner, and the appellant was not denied a fair trial.

II. Purported Sentencing Errors

Appellant asserts the trial court considered improper aggravating factors when imposing the upper term of nine years, including considering the lack of remorse and charges not alleged, and that the court violated the prohibition against the dual use of facts by using the same facts to impose the upper term and the enhancements. He further contends that the court failed to consider the mitigating evidence relating to his mental health.

A. Background

Following the guilty verdict, counsel for both parties filed sentencing memorandums. In its memorandum, the prosecution argued that, pursuant to California Rules of Court, rule 4.421, five aggravating factors supported the high term: (1) the crime involved great violence and great bodily harm; (2) appellant used a weapon; (3) the victim was particularly vulnerable; (4) appellant engaged in violent conduct that indicates he is a danger to society; and (5) appellant's prior convictions were of increasing seriousness. The prosecution requested the high term of nine years for count 1,

plus a three-year enhancement for great bodily injury, and a one-year weapons enhancement. In its sentencing memorandum, the defense requested the low term of five years on count 1, and encouraged the court to strike the special allegations. Defense counsel urged the court to consider appellant's mental disorder as mitigation.

At the sentencing hearing, both counsel argued their respective sentencing recommendations. The court reflected that appellant lacked insight and remorse, observing that appellant had told one of his evaluators that he thought the attack was "accidental." The court also noted that the results might have been different had appellant taken his medicine. Nonetheless, in the court's view, the evidence showed that appellant attacked his father because he was angry with him.

The court then addressed its rationale for the sentence, stating that it agreed "with the People with regard to all their points"—specifically: "The victim was particularly vulnerable. He was in his own home. He is not a young man. He did nothing to contribute to the situation. The crime was particularly vicious and violent. The danger to society remains because the [appellant's] lack of insight." The court further acknowledged: "[A]nd although I sympathize with your mental health condition and I understand that some degree of personal responsibility may be alleviated by virtue of your mental illness, it ultimately still is my paramount consideration to best assure the public that this not happen again."

The court and counsel discussed appellant's custody credits, the imposition of fines and fees and appellate rights. The court asked appellant whether he had any questions about his appellate rights; and appellant asked why "Proposition 8 was violated by the court" during the trial.

B. Analysis

"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).) The choices available include the decision to impose the lower or upper term instead of the middle term of imprisonment.[5]

Here, at no time during the sentencing hearing did defense counsel object to the court's consideration of the aggravating factors and mitigation evidence. In *People v. Scott*, the California Supreme Court held that if the party had a "meaningful opportunity to object" at sentencing but fails to do so (*People v. Scott* (1994) 9 Cal.4th 331, 356), that party may not later raise claims "involving the trial court's failure to properly make or articulate its discretionary sentencing choices." (See *id.* at p. 353.) The

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[5] In imposing an upper term, the trial court may consider circumstances in aggravation (*People v. Sandoval* (2007) 41 Cal.4th 825, 848; Cal. Rules of Court, rules 4.420–4.421), including: "(a) Factors relating to the crime [¶] Factors relating to the crime, whether or not charged or chargeable as enhancements include that: [¶] (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; [¶] (2) The defendant was armed with or used a weapon at the time of the commission of the crime; [¶] . . . [¶] (8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism; [¶] . . . [¶] (b) Factors relating to the defendant [¶] Factors relating to the defendant include that: [¶] (1) The defendant has engaged in violent conduct that indicates a serious danger to society; [¶] (2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness; [¶] (3) The defendant has served a prior prison term." (Cal. Rules of Court, rule 4.421(a)(1), (2), (8) & (b)(1), (2), (3), boldface omitted.)

Scott rule applies to "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." (*Ibid.*)

Accordingly, appellant forfeited his challenges to his sentences by failing to raise them at sentencing. Appellant argues, however, that the *Scott* forfeiture rule should not apply because he was not given an opportunity to object to the proposed sentence. We disagree; appellant had a sufficient and meaningful opportunity both before and during the sentencing hearing to object to the court's sentencing decision. Before the hearing, both parties filed sentencing memorandums and evidence. During the hearing the court allowed argument and evidence from both sides. The record also shows that after pronouncing the sentence, the court discussed various matters with counsel and that during that time defense counsel could have raised an objection to the court's consideration of sentencing factors. Nothing in the record suggests that the court would not have allowed counsel to object to the manner in which the court weighed the aggravating and mitigating circumstances. The record thus demonstrates that appellant was afforded ample opportunity to object and his failure to do so waives the issue on appeal.

In any case, appellant's claim fails on the merits. First, as to appellant's argument that the court did not fully consider appellant's mental health as a mitigating factor, appellant has failed to demonstrate an abuse of discretion. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978 [the burden is on the party attacking the sentence to show that the sentencing decision was irrational or arbitrary].) The record reflects that the trial court considered mitigating mental health evidence. Several times during the sentencing hearing the court acknowledged appellant's

mental health issues—the court "sympathize[d]" with appellant's mental health condition and "under[stood] that some degree of personal responsibility may be alleviated by virtue of [appellant's] mental illness[.]" Although the court did not find that the mitigating evidence outweighed the aggravating circumstances, it appears the trial court properly considered mitigating evidence. (*People v. Kelley* (1997) 52 Cal.App.4th 568, 582 ["The court is presumed to have considered all relevant factors unless the record affirmatively shows the contrary."].) And appellant's claim that the court failed to give sufficient weight to mitigating evidence does not—absent a showing that the court failed in its duty to consider such evidence—demonstrate error. (See *People v. Abilez* (2007) 41 Cal.4th 472, 530 [The fact that the trial court "did not find defendant's proffered mitigating evidence as persuasive as he would have liked does not undermine" the conclusion that the court weighed the aggravating and mitigating evidence].)

Second, appellant has failed to demonstrate reversible error as to the aggravating factors. Although the court indicated that it agreed with the prosecutor as to all of its points, the court primarily focused on appellant's lack of remorse, the vulnerability of the victim and the danger to society posed by appellant based on his conduct. Appellant maintains that the court erred in considering appellant's lack of remorse and insight because he denied his guilt and the evidence of specific intent was in conflict. (*People v. Leung* (1992) 5 Cal.App.4th 482, 507, italics omitted; see also *People v. Holguin* (1989) 213 Cal.App.3d 1308, 1319 ["Lack of remorse may be used as a factor to aggravate under California Rules of Court . . . unless the defendant has denied guilt and the evidence of guilt is conflicting."].) He further complains that the violent nature of the attack was punished with the sentences imposed for the weapon and great bodily injury enhancements, and thus those facts could not also be used to support the upper term sentence. (§ 1170,

subd. (b) [the trial court "may not impose an upper term by using the fact of any enhancement upon which sentence is imposed"]; Cal. Rules of Court, rule 4.420(c).)

Even if those contentions are correct, other aggravating factors support his sentences. The court properly considered the vulnerability of Ditlow, the serious danger to society posed by appellant's conduct and that appellant's prior convictions were of increasing seriousness. Appellant does not challenge any of these aggravating factors on appeal and a single aggravating factor will suffice to justify a trial court's discretionary selection of an upper term. (*People v. Black* (2007) 41 Cal.4th 799, 812.) Remand for resentencing is not required when, as here, a "court could have selected disparate facts from among those it recited to justify the imposition of both a consecutive sentence and the upper term." (*People v. Osband* (1996) 13 Cal.4th 622, 728-729.)

Lastly, appellant's argument that the court improperly considered the fact that appellant could have been charged and convicted of first-degree attempted murder is without merit. During the sentencing before the court stated its rationale for selecting the upper term, the court made a passing remark that appellant was "very lucky that the People did not allege the allegation of premeditation and deliberation because that would carry with it a lifetime [sentence]." Nonetheless, it does not appear that the court relied on that circumstance in reaching the sentence. After discussing what could have been alleged, the trial court further noted that although the facts supported a finding of "premeditation and deliberation, . . . it wasn't alleged, and the jury did not have to grapple with that." The court then proceeded to discuss its reasons for imposing the high-term—the aggravating factors listed in the prosecutor's sentencing memorandum.

Given the foregoing, we conclude appellant's challenge to his sentences fails.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

LUI, J.