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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ANGEL BOBBY LEDEZMA, Defendant and Appellant.	H051773 (Santa Clara County Super. Ct. No. C2112151)

A jury convicted defendant Angel Bobby Ledezma of attempted murder and three other offenses resulting from a gang-motivated shooting. The court sentenced Ledezma to an aggregate term of 29 years four months, including upper term sentences for three counts.

Ledezma contends the sentencing court violated Penal Code section 1170, subdivision (b)[1] (hereafter section 1170(b)) by using a fact to both impose the upper term and to find enhancements true, and by considering aggravating circumstances not proven at trial. We will remand for resentencing.

I. FACTUAL AND PROCEDURAL BACKGROUND

According to an expert, Ledezma was a member of the Varrio Meadowfair gang, a Norteño gang subset. In April 2021, tensions between the Varrio Meadowfair gang and a rival gang were high after a rival gang member was suspected to have killed a Varrio Meadowfair gang member.

[1] Unspecified statutory references are to the Penal Code.

In late April 2021, Tony Denton was driving near Meadowfair Park in San Jose. The Varrio Meadowfair gang claimed this area as its territory. As Denton pulled up to a stop sign near the park, three other drivers positioned their vehicles near Denton's car, obstructing him. People got out of the vehicles and one of them approached Denton, asking: " 'Where you from, homes? And what set you claim?' " Denton testified he had never been associated with any gang, but he recognized these questions as a threat. Denton responded that he was not a gang member and did not live in the area. One of the people who emerged from the vehicles continued to challenge Denton and punched Denton in the face three times.

Denton "smashed on the gas" to get away, striking two of the vehicles obstructing him including a Honda. As Denton was driving away, he felt a sharp pain in his hip. Denton sustained a gunshot wound that resulted in injuries, and was not able to walk for four months.

Investigators obtained video footage of the shooting, which showed the shooter wearing clothes that matched apparel associated with Ledezma. Location data placed Ledezma's phone at or near the park at the time of the shooting. Investigators found a Honda matching that in the video at the home of a woman with whom Ledezma had been in a relationship. The vehicle was damaged. In a text message conversation between Ledezma and the woman, the woman stated Ledezma borrowed the Honda and returned it damaged.

A jury convicted Ledezma of four counts: attempted murder (§§ 664, 187, subd. (a); count 1); assault with a firearm (§ 245, subd. (a)(2); count 2); shooting at an occupied motor vehicle (§ 246; count 3); and owning, purchasing, receiving, and possessing a firearm by a felon (§ 29800, subd. (a)(1); count 4). With respect to counts 1 through 3, the jury found true allegations that Ledezma personally inflicted great bodily injury (§§ 12022.7, subd. (a), 1203, subd. (e)(3)). With respect to counts 1 and 3, the jury found true allegations that Ledezma personally and intentionally discharged a firearm

causing great bodily injury (§ 12022.53, subd. (d)), and with respect to count 2, the jury found true an allegation that Ledezma personally used a firearm (§ 12022.5, subd. (a)).

The amended information also listed two prior conviction allegations and three aggravating circumstances. Ledezma waived his right to a jury trial on these allegations. Ledezma admitted that he sustained a prior strike conviction (§ 1170.12, subd. (b)(1)) and that he was convicted of a prior serious felony (§ 667, subd. (a)(1)). Ledezma also admitted the three aggravating circumstances. For counts 1 through 3, Ledezma admitted he was armed with or used a weapon during the commission of the offenses (Cal. Rules of Court, rule 4.421(a)(2)). Also for counts 1 through 3, Ledezma admitted the crimes involved great violence, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness (*id.*, rule 4.421(a)(1)). For all four counts, Ledezma admitted he was on probation, mandatory supervision, post-release community supervision, or parole when the crimes were committed (*id.*, rule 4.421(b)(4)).

At sentencing, the trial court first denied Ledezma's request to dismiss his prior strike. The court then reviewed the principles of sentencing, stating "punishment and protecting society is of primary importance" in this case. The court told Ledezma he had "not taken any accountability for [himself] or the impact that [his] actions have had on other individuals," the court "had very serious concerns that [he] could pose a danger to the community," Ledezma "never availed [himself] of opportunities of rehabilitations through probation or parole," and Ledezma made no statements "to convey to the court that [he had] any insight into [his] conduct or any remorse for the victim . . . ."

The court then noted aggravating circumstances that applied to Ledezma's case. The court listed the three circumstances Ledezma previously admitted plus three others: Ledezma engaged in violent conduct that indicates a serious danger to society (Cal. Rules of Court, rule 4.421(b)(1)); Ledezma served a prior prison term (*id.*, rule 4.421(b)(3)); and Ledezma's performance on probation and parole was unsatisfactory (*id.*, rule 4.421(b)(5)). The court also noted three mitigating factors: Ledezma was under age

26 at the time the offenses were committed (Cal. Rules of Court, rule 4.423(b)(6)); application of an enhancement could result in a sentence over 20 years (*id.*, rule 4.423(b)(10)); and multiple enhancements were alleged in a single case (*id.*, rule 4.423(b)(11)).

The court discussed Ledezma's request to dismiss two enhancements, noting the aggravating and mitigating factors and stating: "Numerous aggravating factors are reflectively weightier than the mitigating factors." The court stated the mitigating factors weighed "strongly in favor of dismissal," but concluded "other factors outweigh it." The court thus denied Ledezma's request to dismiss the enhancements. In place of the section 12022.53, subdivision (d) firearm enhancement, the court imposed an enhancement under section 12022.53, subdivision (b) for personal use of a firearm during the commission of an offense.

The court then stated: "Given the nature of the defendant's past prior convictions and its increasing seriousness and the frequency weighs against striking the enhancement, a lengthy prison sentence is warranted considering Mr. Ledezma's past and present behavior and the significant physical and emotional toll it had inflicted on the behavior. However, given the defendant's age, the Court believes that a life sentence is excessive given his youthfulness and the Court's hope that the defendant will use his time in prison for rehabilitation. . . . Based on the previously cited factors, the Court believes that the aggravated term on Count one is appropriate." "[C]onsidering the totality of the circumstances which led to this incident and the balancing of the aggravating and mitigating factors," the court imposed a total sentence of 29 years four months, which included the upper term on count 1 and the upper terms on counts 2 and 3 stayed per section 654.

This appeal timely followed.

II. DISCUSSION

Ledezma argues the sentencing court erred in two respects. First, he asserts the sentencing court erred by using the same fact to impose the upper term on counts 1 through 3 that constituted the basis for enhancements relevant to those counts. Second, he contends the sentencing court erred by imposing the upper term based on aggravating circumstances not proved in compliance with section 1170(b). Ledezma asserts the errors prejudiced him. He further argues he received ineffective assistance of counsel if his allegations of error are considered forfeited by the failure to object at sentencing.

The Attorney General asserts Ledezma's claims are forfeited, the sentencing court did not err in either respect, and any error concerning the first issue was harmless.

A. *Legal Principles*

1. *Dual use error*

Under section 1170(b)(5), "[t]he court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law." "A sentencing court may not rely on the same fact to impose a sentence enhancement and the upper term." (*People v. Bowen* (1992) 11 Cal.App.4th 102, 105.) "To comply with section 1170(b)(5), a fact charged and found as an enhancement may be used as a reason for imposing a particular term only if the court has discretion to strike the punishment for the enhancement and does so." (Cal. Rules of Court, rule 4.420(g).)

On appeal, we review the record to determine if substantial evidence of conduct supporting the aggravating circumstance exists apart from the conduct supporting the enhancement. (See *People v. Garcia* (1995) 32 Cal.App.4th 1756, 1775.) "[W]hen an appellant claims the trial court made an impermissible dual use of a fact as both an enhancement and an aggravating factor [citation], the reviewing court looks at whether the trial court *could have* based the aggravating factor on evidence *other* than that which gave rise to the enhancement. If so, the sentence may stand. [Citation.] If, on the other

hand, the trial court could *only* have based the aggravating factor on the evidence giving rise to the enhancement, the sentence must be reversed." (*Id.* at p. 1775.)

2. *Use of unproven aggravating factors*

Effective January 1, 2022, Senate Bill No. 567 (2021-2022 Reg. Sess.) amended section 1170(b) to make the middle term of a sentencing triad the presumptive sentence. (Stats. 2021, ch. 731, § 1.) As amended, section 1170(b)(2) provides: "The court may impose a sentence exceeding the middle term only when there are circumstances in aggravation of the crime that justify the imposition of a term of imprisonment exceeding the middle term and the facts underlying those circumstances have been stipulated to by the defendant or have been found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial." Rule 4.421 of the California Rules of Court lists aggravating circumstances the sentencing court may consider if section 1170(b)(2) is satisfied.

Under the Sixth Amendment to the United States Constitution, "any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt . . . ." (*Cunningham v. California* (2007) 549 U.S. 270, 281.) "Virtually 'any fact' that ' "increase[s] the prescribed range of penalties to which a criminal defendant is exposed" ' must be resolved by a unanimous jury beyond a reasonable doubt (or freely admitted in a guilty plea). [Citations.]" (*Erlinger v. United States* (2024) 602 U.S. 821, 834.) Under the current version of section 1170(b)(2), "a Sixth Amendment violation occurs when the trial court relies on unproven aggravating facts to impose an upper term sentence, even if some other aggravating facts relied on have been properly established." (*People v. Lynch* (2024) 16 Cal.5th 730, 768 (*Lynch*).)

B. *Analysis*

1. *We decline to apply forfeiture.*

Ledezma did not object to consideration of the aggravating circumstances the court listed at sentencing. The probation officer's presentence report listed aggravating

circumstances beyond those Ledezma admitted at trial, and it did not note the dual use issue Ledezma now raises on appeal. The presentence report recommended an aggregate sentence of 21 years that included upper terms on two counts. The defense's sentencing brief did not object to the imposition of the upper term on these counts. At the sentencing hearing, Ledezma's counsel stated: "I just want to reiterate that I have nothing to add to my motion, but I'm asking that the Court follow the probation's recommendation and impose a sentence of 21 years, and I think the Court knows how to get there given probation's motion."

"In general, claims not raised in the trial court may not be raised for the first time on appeal. [Citation.] This includes 'claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices.' [Citation.]" (*People v. Gonzalez* (2024) 107 Cal.App.5th 312, 326 (*Gonzalez*).) However, an appellate court may decline to apply the forfeiture rule. (*People v. Coddington* (2023) 96 Cal.App.5th 562, 568.) "[W]here an otherwise forfeited claim presents an important question of constitutional law or a substantial right, the appellate court may exercise discretion to review the claim." (*People v. Denard* (2015) 242 Cal.App.4th 1012, 1030, fn. 10.) Thus, in *Gonzalez*, this court declined to apply forfeiture to the defendant's section 1170(b) claim where the defendant did not refer to the statute at sentencing, citing the defendant's alternative claim of ineffective assistance of counsel and stating "the application of amended section 1170, subdivision (b) implicates a constitutional right . . . ." (*Gonzalez, supra,* at p. 327.)

Ledezma similarly raises a constitutional claim, arguing the sentencing court's use of an aggravating circumstance not found true at trial violated the Sixth Amendment. Ledezma also contends he received ineffective assistance of counsel if his claims are considered forfeited. Thus, we decline to apply forfeiture and exercise our discretion to reach the merits of Ledezma's claims.

2. *The trial court erred in considering aggravating circumstances not proven at trial, and Ledezma was prejudiced by the court's error.*

The amended information only listed three aggravating circumstances: Ledezma was armed with or used a weapon at the time of the commission of the crimes; the crimes involved great violence, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness; and Ledezma was on probation, mandatory supervision, post-release community supervision, or parole when the crimes were committed. Ledezma admitted only these three aggravating factors at trial.

However, both the probation officer's presentence report and the sentencing court listed the three circumstances Ledezma admitted plus up to four others: (1) Ledezma engaged in violent conduct that indicates a serious danger to society (Cal. Rules of Court, rule 4.421(b)(1)); (2) Ledezma's convictions are numerous or of increasing seriousness (*id.*, rule 4.421(b)(2)); (3) Ledezma served a prior prison term (*id.*, rule 4.421(b)(3)); and (4) Ledezma's prior performance on parole, mandatory supervision, postrelease community supervision, or parole was unsatisfactory (*id.*, rule 4.421(b)(5)).[2] In imposing Ledezma's sentence, the court stated: "Based on the previously cited factors, the Court believes that the aggravated term on Count one is appropriate." The court thus violated section 1170(b)(2) by imposing an upper term sentence based on aggravating circumstances not found true at trial.

[2] The presentence report listed the circumstance that Ledezma's convictions are numerous or of increasing seriousness. The court mirrored the language of this aggravating circumstance by stating: "Given the nature of the defendant's past prior convictions and its increasing seriousness and the frequency weighs against striking the enhancement, a lengthy prison sentence is warranted considering Mr. Ledezma's past and present behavior and the significant physical and emotional toll it had inflicted on the behavior." However, the court did not specifically state it considered that Ledezma's convictions are numerous or of increasing seriousness as an aggravating circumstance. Our conclusion would remain the same regardless of whether the sentencing court considered this seventh aggravating circumstance.

The Attorney General argues the sentencing court merely noted these unproven aggravating circumstances but did not necessarily rely on them. The Attorney General also asserts the sentencing court's statements about unproven aggravating circumstances came in denying Ledezma's request to dismiss enhancements, not in imposing the sentence. We do not agree. The sentencing court stated its sentence was "[b]ased on the previously cited factors," including the unproven aggravating circumstances. Nothing about the court's statements indicates it was merely noting the existence of additional unproven aggravating circumstances without relying on them, and the court specifically referenced the aggravating circumstances it earlier listed—a list that included unproven circumstances—in concluding an upper term sentence was appropriate.

We further agree with Ledezma that the court's error was prejudicial.[3]

Ledezma argues the appropriate standard for gauging harmlessness is provided in *People v. Price* (1991) 1 Cal.4th 324, 492 (*Price*): "When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper." But in *Lynch*, the California Supreme Court held that the amendments to section 1170 applied retroactively to defendants whose judgments were not final on direct appeal when the amendments to section 1170(b) took effect. (*Lynch*, *supra*, 16 Cal.5th at p. 742.) In this situation, the court in *Lynch* stated, "[w]hen the trial court *actually relies* on improperly proven aggravating facts to 'justify' an upper term sentence, a Sixth Amendment violation occurs and *Chapman* [*v. California* (1967) 386 U.S. 18] must be satisfied." (*Id.* at p. 761.)

In denying the request to dismiss enhancements, the sentencing court referenced the number of aggravating circumstances versus the number of mitigating circumstances,

[3] The Attorney General's brief does not contain a harmless error argument on this issue.

stating "[n]umerous aggravating factors are reflectively weightier than the mitigating factors" and the aggravating circumstances "outweigh[ed]" the mitigating circumstances. The court then stated: "Based on the previously cited factors, the Court believes that the aggravated term on Count one is appropriate." The sentencing court's error at least doubled the number of aggravating circumstances admitted at trial, and the court made no statements indicating it would have imposed the same sentence in the absence of the improperly considered aggravating circumstances. We thus conclude it is reasonably probable the court would have imposed a lesser sentence had it known some of its reasons were improper. (See *Price, supra*, 1 Cal.4th at p. 492.) In *Lynch, supra*, 16 Cal.5th 730, our Supreme Court stated that "[w]hen the trial court *actually relies* on improperly proven aggravating facts to 'justify' an upper term sentence, a Sixth Amendment violation occurs and *Chapman* [*v. California* (1967) 386 U.S. 18] must be satisfied." (*Id.* at p. 761.) Assuming without deciding that this more demanding standard applies to the instant situation, our conclusion that Ledezma was prejudiced would necessarily be the same. Because we conclude the trial court's error prejudiced Ledezma, we reverse and remand this matter to the trial court for a new sentencing hearing. We express no opinion regarding what sentence the court should impose on remand. On remand, "[t]he court retains its discretion to impose an upper term sentence if it concludes that one or more properly proved circumstances justify such a sentence. [Citation.] If it cannot so conclude, it may impose no more than a middle term for each of the counts on which [Ledezma] stands convicted." (*Lynch, supra*, at p. 778.)

Because we reverse and remand for resentencing, we need not address Ledezma's contention that the court committed dual use error by relying on same fact—Ledezma was armed with or used a firearm—to both impose enhancements and sentence Ledezma to the upper term. The Attorney General does not dispute that the same fact of Ledezma's arming with or use of a weapon formed the basis for two enhancements and also the use of a weapon aggravating circumstance. Instead, the Attorney General argues

"substantial evidence in the record indicates that the trial court could have imposed each upper term sentence on evidence other than the facts which constituted the basis for the enhancement." To the extent this contention asserts harmless error, we need not address this argument as Ledezma can raise his dual use argument at resentencing. If after resentencing, Ledezma believes the sentencing court has not remedied this issue, any argument regarding prejudice can be raised based on the record at that point.

III. DISPOSITION

The judgment is reversed and the matter is remanded to the trial court for a new sentencing hearing.

_____
Greenwood, P. J.

WE CONCUR:

_____
Danner, J.

_____
Bromberg, J.