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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND WILLIAM RODRIGUES,
JR.,

Defendant and Appellant.

A104212, A105197

(Alameda County Super.
Ct. Nos. H31522, H33120)

In these consolidated actions, defendant Raymond William Rodrigues, Jr., appeals a sentence entered following a plea of no contest in one action, and a judgment entered on a jury verdict in a second action. We order the abstract of judgment in appeal No. A105197¹ amended. As so amended, we affirm the judgments.

I. BACKGROUND

A. Appeal No. A104212

In *People v. Rodrigues* (Super. Ct. Alameda County, 2003, No. H31522),² defendant was charged by information with being a felon in possession of a firearm. (Pen. Code,³ § 12021, subd. (a)(1).) The information also alleged that defendant had suffered three prior felony convictions and served two prior prison terms. On

¹ *People v. Rodrigues* (Super. Ct. Alameda County, 2003, No. H33120); we will refer to the two actions by their numbers on appeal.

² Because the facts of this case are not germane to the appeal, we will not recite them.

³ All undesignated statutory references are to the Penal Code.

October 15, 2002, defendant pleaded no contest to the charge, and admitted the enhancements related to prior prison terms. Pursuant to a *Cruz* waiver,⁴ defendant was allowed to remain released on bail pending sentencing, with the understanding that if he obeyed all laws, cooperated with the probation office, and returned to court for sentencing, he would be sentenced to the midterm of two years in prison and the People would dismiss the priors; if he violated those conditions, he could be sentenced to up to five years (the upper term of three years on the charge plus two one-year enhancements for the prison priors).

On September 5, 2003, based on defendant's violation of the terms of the *Cruz* waiver, the trial court sentenced him to the upper term of three years in prison.

B. Appeal No. A105197

Defendant was charged by amended information with one count of making a threat to commit a crime that would result in death or great bodily injury (§ 422); one count of false imprisonment by violence (§ 236); and one count of second degree robbery (§ 211). As to each count, the information alleged that defendant used a deadly weapon, thus making the offense a serious felony (§§ 12022, subd. (b)(1), 1192.7, subd. (c)(23)), and that he committed the crime while released on bail in appeal No. A104212 (§ 12022.1). The information also alleged four prior felony convictions, resulting in three prison terms (§ 667.5), and one sentence of probation. The incident charged in the information took place on December 2, 2002.

At trial, Lisa Rezendes testified that she began a romantic relationship with defendant in March 2002. After a few months, defendant and Rezendes began fighting; Rezendes characterized defendant as controlling, and said she was afraid to end the relationship with him. Rezendes testified about several episodes that took place before the December 2, 2002, incident. On one occasion, Rezendes was outside, visiting Yvette Olivas, a friend who lived across the street from the home of defendant's mother, where he was staying. Defendant ran up to Rezendes with a razor knife in his hand. Rezendes greeted him, and defendant said, "I could have had you right there." On another

⁴ *People v. Cruz* (1988) 44 Cal.3d 1247.

occasion, while Rezendes was in her car with Olivas outside Olivas's house, defendant approached the car with two circular saws in his hands; he reached into the car, held one blade against the front of Rezendes's neck and another against the back of her neck, and told her he was going to cut her with the blades. He told Olivas that if she didn't want to be splattered with blood, she should get out of the car. When Rezendes's three-year-old daughter, who was in the back of the car, woke up, defendant pulled the blades away and walked off. She did not report the incident to the police because she was afraid defendant would hurt her or her children. In October 2002, Rezendes asked the police to contact child protective services; defendant's two children were later removed from him. He told Rezendes he would kill her unless she helped him get his daughter back. On another occasion, after a fight, defendant grabbed Rezendes by her neck as she started to drive away, telling her to stop or he would snap her neck. Her daughter was in the back seat at the time. On at least one occasion, defendant tried to run Rezendes off the road with his car. Rezendes also testified that defendant threatened both his family and hers. Because she was afraid of defendant, Rezendes did not break off the relationship.

At the end of November 2002, Rezendes told defendant she wanted to end their relationship. By that time, defendant was no longer staying with his mother, but had moved in his motorhome to another location. On the morning of December 2, 2002, defendant called Rezendes to ask for a ride to the courthouse. After initially refusing, she agreed to do so, and went to defendant's motorhome. She went inside, and defendant told her to give him her cell phone. He took the phone and chopped it with an axe. He said to her in an angry tone, "Who are you going to call now, bitch?"; and told her he was going to kill her and she would not get out of there alive. He picked up a pot as if to hit her with it, but it was full of water and he put it down when they both got wet. He picked the axe up again and told Rezendes he would kill her and himself, and that he would kill Olivas as well. He told her she would meet her maker and see her father, who was dead, and that he would torture and beat her. He took off his shirt and ripped it, placed it around his face on his mouth, and told Rezendes the shirt would be long enough to tie her up, that nobody would hear her, and that he would bash her skull if she tried to escape.

He told Rezendes to give him her watch; when she did so, he chopped it with the axe. While holding a pointed, sharp piece of metal about 12 inches long and 4 inches wide, defendant said to her, "It's pretty sharp, huh?" He told her, "You can try to hit me if you want, but you'll only get one hit in and I'll bash your skull in," and he picked up a heavy piece of steel, about six inches long. He sharpened the axe on a cinder block, told Rezendes it hurt worse to be cut with a dull knife than with a sharp one, and shattered the cinder block with the axe. Defendant threw Rezendes a box containing the cremated remains of his late wife, and told her he would put her in the box as well. Rezendes feared for her life. She asked defendant for a cigarette, and he refused. When he told her he was going to kill her, she asked if they could have sex first, in hopes of making him less angry. She talked with him, agreeing that his problems were her fault, and defendant became calmer. After 30 or 45 minutes, Rezendes was confident that defendant's mood had changed; defendant went outside and she followed him. Before she left, defendant told her to take the broken cell phone as a reminder. She did not do so, but left, and reported the incident to the police.

That evening, Officer Daniel Winsor of the Hayward Police Department arrested defendant. In defendant's motorhome, he found an axe, several pieces of a damaged cell phone, and a partial watch band.

Olivas testified that early one morning, when Rezendes came to her window to wake her up, defendant approached with a tool like an old-fashioned barber's razor in his hand, and told Rezendes something like "I could have spliced you" or "I could have came [*sic*] up behind you and just cut you." She also recalled the incident in which defendant approached the car occupied by her, Rezendes, and Rezendes's daughter. He opened the car door and leaned in with his upper body, holding two six-inch-diameter circular saw blades in his hands; she thought they were not shiny metal blades, but were dark, as if they had sand paper on each side, and may not have had sharp edges. He held his hands around Rezendes's face and neck, holding the edge of the saw blades close against her neck. He told Olivas to leave the car unless she wanted Rezendes's blood on her. Olivas left the car and backed away, then told Rezendes firmly to drive away; Rezendes did so.

In October or November 2002, defendant told Olivas that he wanted to blow up Rezendes's car and anyone else who got in the way. Olivas also testified that on December 2, 2002, Rezendes spoke with Olivas, and she was frightened, crying, and extremely upset.

Defendant testified in his own defense. According to defendant, when Rezendes arrived at his motorhome on December 2, 2002, she pulled out a pipe and began to smoke methamphetamine. Rezendes wanted to have sex, but defendant did not; he told her they should stop smoking methamphetamine because it was killing them. They had a fight. Rezendes hit her phone with an axe or a hammer, thinking it was defendant's. He did not threaten her. He did not damage her watch or hold an axe. Defendant also testified about the earlier incident in which Rezendes testified he threatened her with saw blades. According to defendant, they were sanding disks, and he never threatened her with them or put them to her neck. As to the incident with the razor, defendant testified he had a chrome methamphetamine pipe in his hand, and did not tell Rezendes he could have cut her. He denied ever having threatened Rezendes.

The jury found defendant guilty of making criminal threats while personally using a deadly weapon. (§ 422.) It found him not guilty of false imprisonment by violence (§ 236) and of second degree robbery (§ 211). In a bifurcated proceeding, the trial court found the allegations of three prior prison terms to be true. The trial court sentenced defendant to a total term of nine years, based on the aggravated term of three years for making criminal threats (§ 422), a year for the weapon allegation (§ 12022, subd. (b)(1)), two years for committing the offense while on bail (§ 12022.1), and one year for each of the three prior prison term enhancements (§ 667.5, subd. (b)).

II. DISCUSSION

A. Exclusion of Impeachment Evidence

Defendant sought to impeach Rezendes by asking her questions about a 1996 misdemeanor conviction for writing a check with insufficient funds. (§ 476a.)⁵ During

⁵ The trial court referred to the offense as a violation of section 476. Defendant and the Attorney General agree that this was an apparent misstatement.

in limine proceedings, the People opposed the use of the evidence as impeachment, and informed the trial court that if questioned, Rezendes would say that at the time she wrote the check in question, she was not aware she had insufficient funds in her account or that the account had been closed, that she had no intent to defraud, and that she pleaded no contest to the charge because she was tired of going back to court and the public defender advised her to “plead and get it over with.”⁶ The trial court told the parties it considered the probative value of the 1996 incident minimal for purposes of impeaching Rezendes in 2003, and indicated that evaluating Rezendes’s claim she did not know her account had been closed would require “a mini-trial within this trial on that issue.” The court then ruled as follows: “I think even if she admitted an intent that rose to the level of moral turpitude, that the probative value is minimal and that probative value is substantially outweighed not only by the consumption of time, but the danger of creating undue prejudice by confusing the issues in the jury. So I would sustain it even if she admitted it. The fact that she’s going to deny it solidifies the [Evidence Code section] 352 exclusion on grounds of excessive time consumption. So you will not be permitted to make that inquiry.”

Defendant contends the trial court’s ruling deprived him of his Sixth Amendment right to confront and cross-examine the witnesses against him. “Although we recognize that a criminal defendant has a constitutional right to present all relevant evidence of *significant* probative value in his favor [citations], [t]his does not mean that an unlimited inquiry may be made into collateral matters; the proffered evidence must have more than “slight-relevancy” to the issues presented.’ [Citation.] ‘ “[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” ’ [Citation.]” (*People v. Jennings* (1991) 53 Cal.3d 334, 372.) Thus, where “the evidence in question would impeach the witnesses on collateral matters

⁶ The prosecutor also informed the court that the conviction had been set aside under section 1203.4.

and [would be] only slightly probative of their veracity, application of Evidence Code section 352 to exclude the evidence [does] not infringe defendant’s constitutional right to confront the witnesses against him.” (*Ibid.*) As stated in *In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1386, “a trial court’s exercise of discretion to exclude evidence does not implicate or infringe a defendant’s federal constitutional right to confront the witnesses against him, unless the prohibited cross-examination might reasonably have produced a significantly different impression of the witness’s credibility. [Citations.]” (See also *People v. Boyette* (2002) 29 Cal.4th 381, 427-428 [“ ‘[a]s a general matter, the “[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant’s right to present a defense” ’ ”].)

Applying these standards, we see no violation of defendant’s Sixth Amendment rights. We agree with the trial court that a seven-year-old misdemeanor conviction for writing a bad check would have minimal probative value,⁷ and we see no abuse of discretion in the trial court’s conclusion that the consumption of time involved in presenting evidence regarding the incident would substantially outweigh that small amount of probative value. Moreover, defense counsel cross-examined Rezentes regarding her prior inconsistent statements, both to the police and in preliminary hearing testimony, and about her failure to report previous incidents to the police. We recognize that Rezentes was the People’s sole percipient witness to the events that took place in the motorhome on December 2, 2002, and that her testimony contradicted that of defendant. However, we conclude the prohibited cross-examination would not “reasonably have produced a significantly different impression of the witness’s credibility.” (*In re Ryan N., supra*, 92 Cal.App.4th at p. 1386.) Defendant was not deprived of his Sixth Amendment right to confrontation.

⁷ We note not only the age of the conviction, but also the fact that in general, a misdemeanor “is a less forceful indicator of immoral character or dishonesty than is a felony.” (*People v. Wheeler* (1992) 4 Cal.4th 284, 296.)

B. Imposition of Upper Term

Defendant contends the trial court erred in imposing the upper term for making a terrorist threat in appeal No. A105197. In *Blakely v. Washington* (2004) 542 U.S. ____ [159 L.Ed.2d 403, 412; 124 S.Ct. 2531, 2536] (*Blakely*), the United States Supreme Court held that “ ‘[o]ther 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.’ ” The Attorney General argues that defendant forfeited his *Blakely* claim because he failed to object to the aggravated term on that ground in the trial court. We need not decide the issue because any *Blakely* error was harmless here.

The issue of whether *Blakely* applies to the imposition of an aggravated term under the California determinate sentencing law is currently under review by our state Supreme Court. (*People v. Towne* (May 17, 2004, B166312) [nonpub. opn.] review granted July 14, 2004, S125677; *People v. Black* (June 1, 2004, F042592) [nonpub. opn.] review granted July 28, 2004, S126182.) Assuming *Blakely* applies to the California determinate sentencing scheme,⁸ any *Blakely* error was harmless.

Here, in imposing the aggravated term in appeal No. A105197 for making a terrorist threat, the trial court found several factors in aggravation—that the crime involved great violence or threat of violence; that defendant was armed or used a weapon while committing the offense; that defendant had engaged in violent conduct, which indicated a serious danger to society; that his prior convictions were numerous and of increasing seriousness; that he had served two prior prison terms; that he was on misdemeanor probation at the time the offense was committed; and that his prior performance on probation and parole had been unsatisfactory. The court found no factors in mitigation. At least three of these factors—defendant’s numerous and increasingly severe prior convictions, the fact that defendant was on probation at the time of the

⁸ *United States v. Booker* (2005) 543 U.S. ____ [160 L.Ed.2d 621; 125 S.Ct. 738] may have cast doubt on that assumption given the discretionary nature of our sentencing scheme.

offense, and his previous poor performance on probation—relate to prior convictions and recidivism and are excepted from application of *Blakely*. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 243-244; see also *People v. Thomas* (2001) 91 Cal.App.4th 212, 222-223.)

It is well settled that a single factor in aggravation is sufficient to support imposition of an upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728.) Further, “[w]hen 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.” (*People v. Price* (1991) 1 Cal.4th 324, 492.)

Here, the trial court properly relied on three aggravating factors, defendant’s prior convictions, his probationary status at the time of the offense, and his prior unsatisfactory performance on probation and parole, to which *Blakely* does not apply. Considering these factors and that there were no mitigating circumstances, it is not reasonably probable that the trial court would have chosen a lesser sentence if it had known the other factors were improper under *Blakely*.⁹

C. Ineffective Assistance of Counsel

Defendant also contends his counsel was ineffective in failing to object to the use of improper factors in imposing the upper term in appeal No. A105197. In particular, he argues that his use of a deadly or dangerous weapon and his prior prison terms could not be used as factors in aggravation because they were charged and found as enhancements, the punishment for which was not stayed (Cal. Rules of Court, rule 4.420(c)), and the fact that the offense involved the threat of great violence could not be used as an aggravating

⁹ The probation report indicated defendant had suffered 13 previous convictions, including convictions for driving under the influence of alcohol or drugs (Veh. Code, §§ 23152, 23153); destroying or injuring a jail or prison (§ 4600); spousal battery (§ 243, subd. (e)(1)); battery with serious bodily injury (§ 243, subd. (d)); fighting, causing a loud noise, or using offensive words in public (§ 415); and being a felon in possession of a firearm (§ 12021, subd. (a)(1)). It also indicated defendant’s probation had been revoked six times, that he had served seven terms in county jail, and that his performance on parole had been poor.

factor because it was an element of the offense (Cal. Rules of Court, rule 4.420(d)). In assessing a claim of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness and whether defendant suffered prejudice to a reasonable probability. (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.)

For the same reason we have already concluded any *Blakely* error was harmless, we also conclude that any error the trial court made in considering the challenged factors was also harmless. Accordingly, we conclude defendant suffered no prejudice to a reasonable probability, and we reject his claim of ineffective assistance of counsel.

D. Amending Abstract of Judgment

Defendant also contends the trial court should have recomputed the sentence in appeal No. A104212 when it imposed sentence in appeal No. A105197. Section 12022.1, subdivision (e) provides that when a person is convicted of a felony committed while on bail for an earlier felony offense, the court must impose consecutive sentences. (See also § 1170.1; Cal. Rules of Court, rule 4.452.) Defendant argues, and the People concede, that the abstract of judgment in appeal No. A105197 (case No. H33120) should be amended to reflect that the sentence in appeal No. A104212 (case No. H31522) is a subordinate eight-month sentence (one-third the midterm), consecutive to the sentence imposed in appeal No. A105197. We agree. On remand, the trial court is directed to amend the abstract of judgment to reflect such a subordinate sentence.

III. DISPOSITION

The trial court is directed to amend the abstract of judgment in appeal No. A105197 (case No. H33120) in a manner consistent with this opinion. The trial court is ordered to issue an amended abstract of judgment reflecting this modification, and to forward a copy of the amended abstract to the Department of Corrections. In all other respects, the judgments are affirmed.

RIVERA, J.

We concur:

REARDON, Acting P. J.

SEPULVEDA, J.