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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RUSSELL ELIJAH EDWARDS,

Defendant and Appellant.

A129744

(Solano County
Super. Ct. No. VCR 185598)

Defendant Russell Elijah Edwards appeals for the second time from imposition of a 10-year sentence after a jury found him guilty of corporal injury to a spouse and assault with a deadly weapon, and found true allegations that he had inflicted great bodily injury and used a deadly weapon in commission of the crimes. He again challenges the trial court's imposition of both the aggravated term for the great bodily injury enhancement and a separate term for use of a deadly weapon. Unlike the situation before us on the first appeal, on remand the trial court made clear that it was imposing the aggravated term without consideration of defendant's use of a deadly weapon. Therefore, the sentence is permissible and we shall affirm.

BACKGROUND

The following facts are taken from our opinion in defendant's first appeal (*People v. Edwards* (Dec. 18, 2009, A122225) [nonpub. opn.], as modified Jan. 7, 2010).

Defendant and the victim, V.E., had been married for 14 years but were separated at the time of the relevant incident. On August 12, 2006, defendant purchased some clothes for their son and made arrangements for V.E. to pick up the clothes at his mother's house.

V.E. went to the house where she retrieved the clothing. As she was leaving, defendant asked her to go to dinner with him and to a hotel. V.E. refused, and defendant began to beat her with his fists “[a]ll over.” V.E. was screaming. Defendant knocked her to the ground and continued to hit her head and face. He stopped and drove away but returned a short time later with an aluminum baseball bat and began hitting her with it, on “my head, and all over my body.” The next thing V.E. remembered was being moved into an ambulance. She was admitted to the hospital where, among other things, her head was shaved and staples placed in it, and her face was stitched. V.E. testified that she had difficulty remembering events that had taken place between May and August of 2006 because of the trauma sustained in August. Defendant testified that he retrieved the bat with the intention of breaking the windows on the truck that V.E. was driving, but denied hitting her with it.

As relevant here, a jury found defendant not guilty of attempted murder, but guilty of corporal injury to a spouse and assault with a deadly weapon, and found true the use of a deadly weapon allegation with respect to the count of corporal injury to a spouse and the great bodily injury allegations related to both counts. The trial court sentenced defendant to 10 years’ imprisonment, consisting of the upper term of four years for corporal injury to a spouse, plus the upper term of five years for the great bodily injury enhancement and one year for use of a deadly weapon. On the count of assault with a deadly weapon, the court imposed but stayed the aggravated term of four years plus five years for the great bodily injury enhancement.

Defendant appealed, arguing among other things that the trial court had improperly considered his use of the bat both to impose the aggravated term for the great bodily injury enhancement and to sentence him to a separate term for use of a deadly weapon. We held that “the trial court erred in both relying on the use of the deadly weapon in selecting the upper term for the great bodily injury enhancement and imposing an additional one-year enhancement for the use of the weapon. While it is clear from the record that the trial court attached considerable significance to defendant’s use of the bat in causing the great bodily injury, the court also referred to other aggravating factors. We

cannot determine whether, absent consideration of defendant's use of the bat, the court nonetheless would have imposed the upper term for the great bodily injury enhancement. Therefore, we must remand the matter for resentencing. The trial court must either fix the term for the great bodily injury enhancement without regard to the fact that defendant used a weapon to inflict the injury or, if it gives consideration to that factor, strike the separate enhancement for use of the weapon."

At the sentencing hearing on remand, the trial court imposed the same sentence that it had imposed originally, and defendant has again timely appealed.

DISCUSSION

Defendant argues that the trial court again improperly relied on his use of the bat to impose the aggravated term for the great bodily injury enhancement and to impose a consecutive term for use of a deadly weapon. However, it is now clear from the record that in choosing the upper term on the great bodily injury enhancement the trial court did not improperly rely on the use of the bat.

In explaining his sentencing choices on remand, the trial court stated, "the matter has been remanded to the court specifically in this remittitur, for the court to either fix the term for the great bodily injury enhancement, without regard to the fact the defendant used a weapon to inflict the injury, or if the court considers that factor, to strike the separate enhancement for use of the weapon." The court then found, "With regard to the appropriate term for the great bodily injury enhancement, I do feel that the upper term is the appropriate term. And I do think that the defendant's lack of insight—I know [defense counsel] pointed out the defendant's position that he did not strike her; that he was feigning in striking her, but that's not what the eyewitness said. That's not what the victim said, and that's not what the police officer who happened on the scene said, as it appeared to them, and plus, it makes absolutely no sense. The manner in which this offense unfolded, is the defendant did in fact lure the victim to his house under the pretext of providing some clothes for a couple of their children. This was despite the fact that there was a restraining order at the time, and he had told the victim when he called her that he wouldn't be present. . . . [¶] . . . [¶] The witness in the neighboring house saw

her essentially beaten to the ground, as did the defendant's mother who was standing there [¶] A second witness appeared and assisted the victim to her car. Got her up to her car, and she was dazed at that time, and suddenly the defendant appeared back in his car They said that he drove up at a very high speed. . . . [¶] He came out of the car again and began beating her again with his fists. He again beat her to the ground, but that wasn't enough. He then returned to his car and got a bat and went back to the victim, who was now helpless on the ground, and started striking her with this bat [¶] It wasn't until the police officer ordered the defendant to desist that he quit striking her."

The trial court continued, "I am reciting all of this because I see nothing, nothing at all, mitigating in these circumstances. Th[e] original charge was attempted murder and it appeared to the court, after I listened to all the evidence, that if the police officer had not arrived when he did, we would have been dealing with a homicide. I don't think there is any question about it because the defendant wasn't about to stop striking the victim." The trial court then detailed defendant's denials to the probation department, the fact that he felt the victim was particularly vulnerable when she was being struck by the bat because "she had already been beaten twice . . . by the defendant with his fists, and she was lying helpless on the ground[]." The trial court also observed that the defendant lured the victim there, which suggests planning.

The court then found "for all of these reasons, and the fact that there really is nothing in mitigation here regarding the infliction of great bodily injury, I do feel that the upper term is the appropriate term. Then, separately, the court would impose a one-year term for the use of the bat. *I want the record to reflect I am not considering the use of the bat in any way when I am imposing the upper term here* [¶] I will also point out that this offense is certainly an offense which indicates . . . the infliction of great bodily injury occurred when the defendant was engaged in violent conduct, and would indicate a serious danger to society, and the infliction of great bodily injury also indicates that the defendant's conduct in this matter was increasingly serious. It was certainly far more serious than anything, in terms of danger to the community, that the defendant had committed before."

As we noted in our original opinion, where a weapon is used in each of several offenses, “the trial court need not impose the enhancement to each conviction and may not so impose an enhancement if the weapon use is utilized for aggravation purposes.” (*People v. Price* (1984) 151 Cal.App.3d 803, 809.) Defendant argues, “The trial court’s reasons on remand echoed its original reasons, even in the court’s terminology: observing appellant’s lack of ‘insight’ and his planning behavior constituting a ‘lure’ or a ‘set up.’” Thus, the trial court has not assisted this court in determining the bat use was not a key factor in imposition of the upper enhancement term.” On the contrary, in the emphasized statement above, the trial court made explicit that it was not relying on the use of the bat in its decision to impose the aggravated term for the other enhancement. Although the court’s explanation of its reasoning of course made reference to the bat, which unquestionably was part of the story, the court made clear that the aggravated term for inflicting great bodily injury was selected not because defendant used the bat, but because of his denial of responsibility for the crime, because defendant planned the crime, and because of the vulnerability of the victim. The additional sentence for use of a deadly weapon was therefore permissible because the trial court did not rely on the use of the weapon in imposing the aggravated term for the great bodily injury enhancement.

DISPOSITION

The judgment is affirmed.

Pollak, Acting P. J.

We concur:

Siggins, J.

Jenkins, J.

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