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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.
DARRYL WILLINGHAM,
Defendant and Appellant.

A129975
(San Francisco County
Super. Ct. No. 212262)

Defendant Darryl Willingham appeals the judgment and sentence imposed following his jury trial conviction for failing to register as a sex offender upon release from incarceration, in violation of Penal Code section 290.015, subdivision (a).¹ Defendant contends there is insufficient evidence to support his conviction and that the trial court erred in imposing the aggravated term for the offense. We shall affirm.

FACTS AND PROCEDURAL BACKGROUND

In May 2010, the District Attorney for the City and County of San Francisco (DA) filed an information which, as amended, alleged that between March 23 and April 3, 2008, defendant failed to register (or reregister if previously registered) as a sex offender upon release from incarceration, in violation of sections 290.015, subdivision (a) and 290, subdivision (b). The amended information also alleged that defendant suffered a prior strike conviction for rape by force or violence in November 1992 (§ 667, subds. (d)-(e); § 1170.12, subds. (b)-(c)). In granting the DA's motion to amend, the trial court

¹ Further statutory references are to the Penal Code unless otherwise noted.

dismissed count 2 of the original pleading, a misdemeanor allegation that defendant was in willful violation of a protective order when he was arrested at his former girlfriend's apartment on April 3, 2008, and dismissed two strike allegations that defendant had suffered a prior conviction for sexual penetration by a foreign object in November 1992, and a prior conviction for oral copulation by force or violence in April 1995. .

A jury was empanelled and the presentation of evidence commenced on June [sic] 19, 2010. San Francisco Sheriffs' Department custodian of records, Senior Deputy Luigi Cauteruccio, testified concerning defendant's recent arrest and detention record in San Francisco. Cauteruccio testified department records showed defendant had been arrested and booked into custody on February 12, 2008. As a part of the booking process, defendant's mug shot and fingerprints were taken. Defendant remained incarcerated in county jail until his release on March 18, 2008. Department records established that defendant was booked into custody again on April 4, 2008.

San Francisco Police Officer Ryan Hart testified that he arrested defendant on April 3, 2008. Hart was dispatched to an apartment building on Van Ness Avenue where he took defendant into custody and transported him to the Northern Station at Fillmore and Eddy Streets. From there, defendant was transported to the county jail where he was booked into custody by the San Francisco Sheriff's Department.

Delores Haste, custodian of records for the Department of Justice's sex offender tracking program, testified concerning defendant's sex offender registration history as reflected in his section 290 packet. A section 290 packet is a compilation of registration forms and other information unique to each sex offender. Defendant's section 290 packet contained his fingerprint card, his registration, change of address and annual update forms, as well as notification forms by which defendant was informed of his lifetime duty to register as a sex offender. Haste explained that a person convicted of enumerated sex offenses is required to report to a local law enforcement agency and register with that agency. The agency then enters the registrant's information into a database known as the VCIN Violent Crime Information Network, otherwise known as the California sex offender registry. All law enforcement agencies within California are authorized to

accept registrations from sex offenders, and must enter the sex offender's information into the database within three days or forward the registration documents to the Department of Justice for entry.

Haste further testified that defendant's section 290 packet shows he registered approximately seven times after notification of his duty to register in May 2000. Defendant first registered in November 2000. Defendant filed a change of address form on November 29, 2000, and further updated his address information on October 22, 2001, and October 22, 2002. A change of address form bearing the date of December 12, 2002, as well as registration forms dated September 2, 2003, October 27, 2003, and July 5, 2005, were also in defendant's section 290 packet. Haste stated that in order to register as a transient, a person is required to register annually on his birthday and every 30 days during the interim between birthdays. Defendant's section 290 packet reflected that he registered as a transient on August 4, 2005, and again on September 29 and October 31, 2005. The October 2005 registration was the last registration form in the defendant's section 290 packet. There were no registration forms for March or April 2008 in the packet.

The last witness presented by the prosecution was Rene Rodrigues, a senior supervisor fingerprint technician for the San Francisco Police Department's Identification Bureau. Rodrigues testified that the fingerprints taken from defendant when he was booked into custody on February 12, 2008, matched the fingerprints obtained from defendant when he was arrested on April 4, 2008, and the fingerprints obtained from defendant on April 4th matched the fingerprints contained in the section 969b package under defendant's name and certified by the Department of Corrections. In addition, Rodrigues testified that the rolled right thumbprint in defendant's section 290 packet belonged to the same person, Darryl Willingham, who provided the fingerprints at his arrest on February 12, 2008 and April 4, 2008. After Rodrigues testified, the prosecution rested. Defendant did not testify or present any evidence in his defense.

After presentation of the evidence, the court instructed the jury as follows: "The defendant is charged in Count 1 with failing to register as a sex offender within five days

of release from incarceration, in violation of Penal Code section 290.015(a). To prove that the defendant is guilty of this crime, the People must prove that: 1. The defendant was previously convicted of either Penal Code section 288a(c)(2), Penal Code section 261(a)(2), or, Penal Code section 289(a). (You must be unanimous in deciding which of these crimes defendant was guilty of); 2. The defendant was incarcerated for more than thirty days for any new offense; 3. The defendant actually knew he had a duty to register as a sex offender under Penal Code section 290.015(a) within five working days of his release from incarceration; AND 4. The defendant willfully failed to register as a sex offender with the police chief of any city or the sheriff of any county within five working days of release from incarceration. Someone commits an act willfully when he or she does it willingly or on purpose.”

In his closing summation, defense counsel argued that there was reasonable doubt about defendant’s guilt because it is possible he registered with a local agency and the registration information was not forwarded to the Department of Justice. Following deliberations, the jury returned a guilty verdict and found true the allegation that defendant was previously convicted of rape by means of force or violence (§ 261, subd. (a)(2)).

The court held a sentencing hearing on December 8, 2010. During the hearing, the prosecutor urged the court to impose the aggravated term of 3 years, doubled to six years on the strike conviction, arguing that defendant “was given every break in the world when I dismissed two of the prior strikes lowering the sentence from life to a maximum of six years” and that the aggravated term was justified by “the prior convictions that were dismissed” and the fact that defendant showed no remorse for his crime.² The court adopted the prosecutor’s recommendation and imposed the aggravated term of three years, doubled to six years on defendant’s strike conviction. The trial court noted two aggravating factors justifying the aggravated term, defendant’s two prior convictions that

² Addressing the court at the sentencing hearing, defendant stated that “everything here is a fraud.”

were stricken by the prosecution for sentencing purposes, and the fact defendant had served a prior prison term. Defendant filed a timely notice of appeal on October 7, 2010.

DISCUSSION

A. *Sufficiency of the Evidence*

Defendant contends his conviction is not supported by sufficient evidence. Defendant first posits that to establish a violation of Section 290.015, the prosecution was required to prove he was a “resident” of the locality in which he was required to register. Based upon the prosecution’s failure to prove the “residency” element purportedly mandated by statute, defendant argues that his conviction must be reversed for insufficiency of the evidence.

Although couched in terms of sufficiency of the evidence, defendant’s argument is actually one of statutory interpretation. In support of his contention, defendant relies upon the language of section 290.015, subdivision (a), which states that a sex offender must register or reregister upon release from incarceration lasting 30 days or more, pursuant to section 290, subdivision (b). (§ 290.015, subd. (a).)³ Section 290,

³ Section 290.015, subdivision (a) provides that a sex offender “shall register, or reregister if the person has previously registered, upon release from incarceration, placement, commitment, or release on probation pursuant to subdivision (b) of Section 290. This section shall not apply to a person who is incarcerated for less than 30 days if he or she has registered as required by the Act, he or she returns after incarceration to the last registered address, and the annual update of registration that is required to occur within five working days of his or her birthday, pursuant to subdivision (a) of Section 290.012, did not fall within that incarceration period. The registration shall consist of all of the following: [¶] (1) A statement in writing signed by the person, giving information as shall be required by the Department of Justice and giving the name and address of the person’s employer, and the address of the person’s place of employment if that is different from the employer’s main address. [¶] (2) The fingerprints and a current photograph of the person taken by the registering official. [¶] (3) The license plate number of any vehicle owned by, regularly driven by, or registered in the name of the person. [¶] (4) Notice to the person that, in addition to the requirements of the Act, he or she may have a duty to register in any other state where he or she may relocate. [¶] (5) Copies of adequate proof of residence, which shall be limited to a California driver's license, California identification card, recent rent or utility receipt, printed personalized checks or other recent banking documents showing that person's name and

subdivision (b), in turn, states that every person convicted of certain enumerated sex offenses, “for the rest of his or her life while residing in California, or while attending school or working in California . . . shall be required to register with the chief of police of the city in which he or she is residing, or the sheriff of the county if he or she is residing in an unincorporated area or city that has no police department, and, additionally, with the chief of police of a campus of the University of California, the California State University, or community college if he or she is residing upon the campus or in any of its facilities, within five working days of coming into, or changing his or her residence within, any city, county, or city and county, or campus in which he or she temporarily resides, and shall be required to register thereafter in accordance with the Act.” (§ 290, subd. (b).)

Based on the foregoing statutory language, defendant asserts section 290, subdivision (b), “provides only for the registration of persons who are residing in certain jurisdictions—i.e., *who have residences*.” From this assertion, defendant argues that because section 290.015 incorporates section 290, subdivision (b), section 290.015 imports section 290 (b)’s “residence” requirement. Thus, according to defendant, the prosecution was required to prove he had a “residence” in the jurisdiction where he failed to register to convict him under section 290.015. Defendant’s contention is belied by the plain language of sections 290, subdivision (b) and 290.015, subdivision (a). (See *People v. Smith* (2004) 32 Cal.4th 792, 797 [stating that the plain language of a statute provides the most reliable indicator of Legislative intent].)

address, or any other information that the registering official believes is reliable. If the person has no residence and no reasonable expectation of obtaining a residence in the foreseeable future, the person shall so advise the registering official and shall sign a statement provided by the registering official stating that fact. Upon presentation of proof of residence to the registering official or a signed statement that the person has no residence, the person shall be allowed to register. If the person claims that he or she has a residence but does not have any proof of residence, he or she shall be allowed to register but shall furnish proof of residence within 30 days of the date he or she is allowed to register.”

First, section 290, subdivision (b) is the “hub” of the Act,⁴ setting forth the registration requirements generally applicable to all sex offenders. In this regard, section 290, subdivision (b) specifies that a sex offender must register with the Chief of Police, County Sheriff or Chief of Campus Police of the city or county in which he or she is residing and mandates that registration is required within five working days of “*coming into*” or “*changing his or her residence*” within the city or county. (See § 290, subd. (b) [italics added].) The statutes following section 290 (b) set forth additional regulations governing specific categories of sex offender registrants, such as transient sex offenders (section 290.011) and sex offenders released from incarceration (section 290.015).⁵ As noted, section 290, subdivision (b)’s registration requirements encompass persons coming into a city or county or persons changing residence within a city or county.

Defendant’s view that section 290, subdivision (b) applies only to persons with a “residence” equates the terms “residing” and “residence” as used in the statute and makes one synonymous with the other. This view has already been rejected by one appellate

⁴ “Sections 290 to 290.023, inclusive, shall be known and may be cited as the Sex Offender Registration Act. All references to “the Act” in those sections are to the Sex Offender Registration Act.” (§ 290, subdivision (a).)

⁵ Prior to October 13, 2007, the provisions now set forth in sections 290.011 and 290.015 were all contained within former section 290. (See former § 290, effective Sept. 20, 2006 to Oct. 12, 2007.) Effective October 13, 2007, however, Senate Bill 172 made “nonsubstantive, conforming changes” to the provisions relating to sex offenders, including a reorganization and renumbering of the provisions describing registration procedures for sex offenders. (Leg. Counsel’s Dig., Sen. Bill No. 172, Stats. 2007, ch. 579, p. 1.) In this regard, Senate Bill 172 repealed section 290 and added a new section 290 in which former subdivision (a)(1)(A) (describing the lifetime registration requirement for sex offenders) became section 290, subdivision (b), and former subdivision (a)(2)(A) (enumerating which convicted persons must register as sex offenders), became section 290, subdivision (c). (Cf. former § 290, effective Sept. 20, 2006 to Oct. 12, 2007 and the current version of § 290.) Additionally, Senate Bill 172 enacted section 290.011, which sets forth the same registration requirements for transients described in former section 290, subdivision (a)(1)(C), as well as section 290.015, which sets forth the same registration requirements for sex offenders released from incarceration after 30 days or more contained in former section 290, subdivision (e)(2). (Cf. former § 290, effective Sept. 20, 2006 to Oct. 12, 2007 and §§ 290.011, 290.015.)

court. (See *People v. Williams* (2009) 171 Cal.App.4th 1667, 1672-1673 [noting that former section 290, subdivision (a)(1)(A)—now section 290, subdivision (b)—applies where the sex offender “is residing” in a given jurisdiction, and rejecting appellant’s contention that “a person ‘is residing’ in a jurisdiction only when staying at a place of residence” because it “confuses the concept of residing in a jurisdiction with having a place of residence there”].) The *Williams* court’s conclusion is borne out by the pertinent statutory language, which demonstrates that the terms “residing” and “residence” are not synonymous. The sex offender’s duty to register under section 290, subdivision (b) is triggered by “coming into” a city or county, or by “changing his or her residence” within a city or county. Thus, a person who “comes into” a city or county, but does not establish a “residence” within five days, nevertheless is “residing” within the city or county for purposes of section 290, subdivision (b) and must register with the Sheriff or Chief of Police.

Second, defendant’s argument that section 290.015 imports a “residency” requirement in light of its incorporation of section 290 (b), is inconsistent with the plain language of section 290.015. Specifically, subdivision (a)(5) of 290.015 provides that “[i]f the person *has no residence* and no reasonable expectation of obtaining a residence in the foreseeable future, the person shall so advise the registering official and shall sign a statement provided by the registering official stating that fact. Upon presentation of proof of residence to the registering official *or a signed statement that the person has no residence, the person shall be allowed to register.*” (*Ibid.* [italics added].) This statutory language clearly evidences that the Legislature did not limit, as defendant contends, the registration requirements of Section 290.015 to persons having a residence. To the contrary, when read in its entirety, section 290.015 encompasses registration of persons, upon release from incarceration, who have a “residence” as well as those who do not. (See *City of Long Beach v. California Citizens for Neighborhood Empowerment* (2003) 111 Cal.App.4th 302, 305 [stating that in construing statutory language, courts give “significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose” and that a construction “making some words surplusage is to be

avoided”].) In short, the plain language of section 290.015 defeats defendant’s assertion that proof of a “residence” is a required element to establish a violation of section 290.015, subdivision (a).

Defendant offers several additional arguments in support of his contention that section 290.015 applies only to sex offenders who have a “residence.” In this regard, he notes that section 290.011 delineates the registration requirements for any sex offender living as a “transient,” i.e., “a person who has no residence”⁶ (§ 290.011, subd. (g)), and mandates that transient sex offenders “shall register, or reregister if the person has previously registered, within five working days from release from incarceration . . . pursuant to subdivision (b) of Section 290. . . .” (§ 290.011, subd. (a).)⁷ Defendant argues that in enacting sections 290.011 and 290.015, the Legislature intended to create symmetrical, but independent, statutory provisions governing the registration

⁶ ‘Residence’ means one or more addresses at which a person regularly resides, regardless of the number of days or nights spent there, such as a shelter or structure that can be located by a street address, including, but not limited to, houses, apartment buildings, motels, hotels, homeless shelters, and recreational and other vehicles.” (§290.011, subd. (g).)

⁷ The registration provisions of Section 290.011 also require that “[b]eginning on or before the 30th day following initial registration upon release, a transient shall reregister no less than once every 30 days thereafter. A transient shall register with the chief of police of the city in which he or she is physically present within that 30-day period, or the sheriff of the county if he or she is physically present in an unincorporated area A transient shall reregister no less than once every 30 days regardless of the length of time he or she has been physically present in the particular jurisdiction in which he or she reregisters. If a transient fails to reregister within any 30-day period, he or she may be prosecuted in any jurisdiction in which he or she is physically present.” (§290.011, subd. (a).) Section 290.011 also addresses registration requirements for sex offenders who are registered at a residence and become transient and, conversely, sex offenders who are transient and then move to a residence, (see § 290.011, subd. (b)). In addition, section 290.011 mandates that following registration transient sex offenders must also update registration annually within five days of his or her birthday. In these annual updates, as well as the updates every 30 days, transient sex offenders must provide “current information as required on the Department of Justice annual update form, including the information described in paragraphs (1) to (3), inclusive, of subdivision (a) of Section 290.015, and the information specified in subdivision (d).” (§ 290.011, subd. (c).)

requirements of two distinct classes of sex offenders; sex offenders living as transients (§ 290.011) and sex offenders with residences (§ 290.015). Moreover, defendant asserts that the Legislature’s intention to separate the registration requirements for sex offenders living as “transients” from those with “residences” is evident in the penalty scheme set forth in these statutes: A violation of section 290.011 is punishable as a misdemeanor while failure to register under 290.015 is a felony. Accordingly, defendant argues a construction of section 290.015, subdivision (a) that omits the residence requirement would undermine the Legislature’s intent to punish persons with “residences” who fail to register more severely than “transients” who fail to register. Last, defendant contends that absent a residence requirement, his felony conviction under section 290.015 violates equal protection because the conduct for which he was convicted (willful failure by transient to register upon release from incarceration) is also punishable as a misdemeanor offense under 290.011.

Defendant’s arguments are unpersuasive. First, as noted above, the plain language of section 290.015, subdivision (a), flatly contradicts defendant’s assertion it only applies to persons with a “residence.” (See § 290.015, subdivision (a)(5) [describing registration procedure for sex offender released from incarceration after 30 days or more who “*has no residence*”].)

Second, defendant’s attempt to account for the fact that section 290.011, like 290.015, incorporates section 290, subdivision (b), by reference is strained and unavailing. He postulates section 290.011, subdivision (a), unlike section 290.015, *does not* import the “residence” requirement he ascribes to section 290, subdivision (b), and that the latter section, within the context of 290.011, means only that a transient who is physically present within a jurisdiction must register with the same entities (i.e. City Chief of Police or County Sheriff) with which a person who has a residence in that jurisdiction must register. As noted above, however, the statutory history shows when the Legislature enacted section 290, subdivision (b), it did so without any substantive change (see *ante*, fn. 5). Thus, section 290, subdivision (b) carries the same meaning throughout the Act, including sections 290.011 and section 290.015, and as noted above,

pertains not only to persons having a “residence” within, but also to persons residing in, a jurisdiction.

Furthermore, at the time the Legislature enacted section 290.011 in 2007, it chose not to amend the language in section 290.015, subdivision (a) (5). Had the Legislature intended that all sex offenders classified as transient be subject to prosecution solely under section 290.011, we think it axiomatic that it would have deleted subdivision (a)(5) of section 290.015, which requires the registration of sex offenders, released from incarceration, with or without a residence.⁸

Finally, we need not tarry long with defendant’s assertion of inequality arising from the possibility of increased punishment for the same conduct if section 290.015 discloses no residence limitation.⁹ Defendant is required to register as a sex offender by

⁸ We acknowledge there may be some duplication inherent in sections 290.011 and 290.015 with respect to provisions governing registration requirements for transient sex offenders upon release from incarceration. On the other hand, we discern nothing inherently contradictory in those provisions. Section 290.011 describes procedures for sex offenders currently “living as a transient” to comply with the Act, whereas section 290.015 describes procedures for sex offenders released after a period of incarceration (at which point they may, or may not, have a “residence”) to comply with the Act. That there is a measure of duplication may simply reflect a Legislative intent to ensure all sex offenders, properly classified as transients, are swept within the Act, and thus remain under police surveillance, whether currently “living as a transient” or transient upon release from incarceration. (See *Wright v. Superior Court* (1997) 15 Cal.4th 521, 527 [stating the Legislature perceives that sex offenders pose a “ ‘continuing threat to society’ ” and that mandatory registration for sex offenders is “intended to promote the ‘state interest in controlling crime and preventing recidivism’ by assuring that convicted sex offenders “shall be readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future ”].) In any event, to the extent these statutes evidence some duplication, defendant’s concerns are more appropriately addressed to the Legislature.

⁹ Section 290.011’s penalty provisions state: “Failure to comply with the requirement of reregistering every 30 days following initial registration pursuant to subdivision (a) shall be punished in accordance with subdivision (g) of Section 290.018. Failure to comply with *any other requirement of this section* shall be punished in accordance with either subdivision (a) or (b) of Section 290.018.” (§ 290.011, subd. (e) [italics added].) Section 290.018, in turn, provides in pertinent part: “(a) Any person who is required to register under the Act based on a misdemeanor conviction or juvenile

dint of his prior felony sex offenses, including, as found by the jury, rape by means of force or violence in violation of section 261, subdivision (a)(2). The pertinent statutory provisions (see *post*, fn. 9) provide that a sex offender prosecuted under section 290.011 for willful failure to register or register upon release following a period of incarceration of 30 days or more, is subject to punishment as a felony *if the underlying sex offense of conviction is a felony*, (see § 298.018, subs. (a)-(b)). Thus, defendant’s conduct was subject to prosecution as a felony under section 290.011 or 290.015. Accordingly, defendant’s equal protection contention fails.

In sum, we reject defendant’s assertion that a conviction for failure to register as a sex offender upon release from a period of incarceration under section 290.015, subdivision (a), requires proof of a “residence.” Defendant’s contention on this score is belied by the plain language of the statute. Moreover, our interpretation comports with the Legislature’s clear intent that the provisions of the Act be read in a manner that ensures all persons who must register as sex offenders are subject to police surveillance, whether transient at the time of release from incarceration or living as a transient. (See *Wright v. Superior Court*, *supra*, 15 Cal.4th at p. 527.)

B. Ineffective Assistance of Counsel

A defendant claiming ineffective assistance of counsel (IAC) has the burden to show: (1) counsel’s performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v.*

adjudication who willfully violates any requirement of the act is guilty of a misdemeanor punishable by imprisonment in a county jail not exceeding one year. [¶] (b) [A]ny person who is required to register under the act based on a *felony conviction* . . . who willfully violates any requirement of the act . . . is guilty of a felony and shall be punished by imprisonment in the state prison for 16 months, or two or three years. [¶] . . . [¶] (g) [A]ny person who is required to register or reregister pursuant to Section 290.011 and willfully fails to comply with the requirement that he or she reregister no less than every 30 days is guilty of a misdemeanor and shall be punished by imprisonment in a county jail for at least 30 days, but not exceeding six months.” (§ 290.018, subs. (a), (b), & (g).)

Ledesma (1987) 43 Cal.3d 171, 216-218.) Where an IAC claim is based on trial counsel's failure to render an objection, a defendant must prove not only the absence of a reasonable tactical explanation for the omission but also that the motion or objection would have been meritorious. (*People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1272.) Prejudice is shown when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland, supra*, 466 U.S. at p. 694.)

Defendant contends he received IAC at sentencing because trial counsel failed to object to a sentencing error by the trial court.¹⁰ Defendant avers he suffered prejudice thereby because had counsel timely objected there is a reasonable probability the trial court would have imposed either the middle or the lower term.

Defendant identifies two alleged sentencing errors. First, defendant asserts that the court erred by using an "element[s] of the offense," namely, the fact of his prior convictions, to justify the aggravated term, in violation of California Rules of Court, rule 4.420(d).¹¹ Defendant also contends the fact he served a prior prison term was not sufficiently aggravating to warrant imposition of the upper term.¹² We address each argument in turn.

¹⁰ Generally, trial counsel's failure to object to the trial court's sentencing rationale waives the issue for appeal. (See *People v. Scott* (1994) 9 Cal.4th 331, 353 [holding that "the waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices. Included in this category are 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].)

¹¹ Further citations to the California Rules of Court state the rule number only.

¹² Further, defendant asserts that "[l]egal fine points aside, there was not anything aggravated about the offense or the offender in this case," before proceeding to opine on the wisdom of the trial court's sentencing decision. However, defendant's opinions on the matter are irrelevant to his IAC claim, which concerns trial counsel's failure to object to identifiable sentencing error on the part of the trial court.

Defendant maintains the trial court erred under rule 4.420(d) by relying on the same facts the jury used to convict him of failure to register upon release from incarceration, i.e., his prior convictions. Rule 4.420(d) provides, “A fact that is an element of the crime upon which punishment is being imposed may not be used to impose a greater term.” Nevertheless, “where the facts surrounding the charged offense exceed the minimum necessary to establish the elements of the crime, the trial court can use such evidence to aggravate the sentence. (Citations.) Stated another way, rule 420(d) ^[13] does not preclude a court from using facts to aggravate a sentence when those facts *establish elements not required* for the underlying crime.” (*People v. Castorena* (1996) 51 Cal.App.4th 558, 562.)

Here, to convict defendant of the offense charged, the jury had to find unanimously and beyond a reasonable doubt that defendant was previously convicted of violating only one of three felonies; section 288a, subdivision (c)(2), section 261, subdivision (a)(2), or section 289, subdivision (a). Thus, the trial court was entitled to consider the fact that defendant suffered prior convictions in excess of the one required for the offense of conviction. (*People v. Castorena, supra*, 51 Cal.App.4th at p. 562.) Moreover, the court was also entitled to consider as an aggravating factor the DA’s dismissal of two of defendant’s strike priors before trial, thereby limiting his exposure under the Three Strikes law.¹⁴

¹³ Rule 420 was renumbered rule 4.420, eff. Jan. 1, 2001 without any substantive change to it. (See rule 4.420, Credit(s).)

¹⁴ (See *People v. Sandoval* (2007) 41 Cal.4th 825, 847-848 [stating that a trial court’s sentencing discretion must turn on an “ ‘individualized consideration of the offense, the offender, and the public interest.’ . . . [¶] . . . [¶] [In this regard,] a trial court is free to base an upper term sentence upon any aggravating circumstance that the court deems significant, . . . [and the] court’s discretion to identify aggravating circumstances is otherwise limited only by the requirement that they be ‘reasonably related to the decision being made.’ [Citation.]”].) Moreover, because defendant cites no legal authority to support it, we reject his novel contention that the trial court was precluded from considering defendant’s prior convictions at sentencing on the basis of prosecutorial conduct meriting application of the doctrine of estoppel.

Defendant also argues the trial court erred at sentencing by relying on a single factor in aggravation—the fact he suffered a prior prison term: Defendant characterizes this factor as “valid,” but “weak.” We reject defendant’s characterization. A defendant’s prior prison term is a valid factor in aggravation (see rule 4.421(b)(3)), and the trial court was free to assign such value to that factor as it saw fit under the facts of the case. (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401 [“ ‘Sentencing courts have wide discretion in weighing aggravating and mitigating factors [citations], and may balance them against each other in qualitative as well as quantitative terms.’ [Citation.]”].) Defendant has not established the trial court abused its considerable discretion in determining that defendant’s prior conviction supported imposition of an aggravated sentence. (See *People v. Black* (2007) 41 Cal.4th 799, 813 [presence of one aggravating factor is sufficient to support an upper term sentence]; *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583 [trial court need not explain its reasons for rejecting mitigating factors].)¹⁵

In sum, defendant has failed to identify any sentencing error by the trial court to which an objection would have been meritorious.¹⁶ Thus, defendant cannot establish trial

¹⁵ In all events, as we have already determined (see *ante*), in addition to defendant’s prior prison term the trial court was entitled to consider the fact he had two prior convictions in addition to the one constituting an element of the offense, and that the DA struck those for purposes of the Three Strikes Law.

¹⁶ Defendant also criticizes trial counsel for failing to identify and present for the court’s consideration mitigating factors relevant to the trial court’s sentencing decision. In this regard, defendant asserts trial counsel failed to advocate for mitigation on the basis that his prior convictions dated from 1992, that he had successfully completed parole, that he scored 3 out of 10 on the State-Authorized Risk Assessment Tool for Sex Offenders (SARATSO), and that he was suffering from obvious mental problems. However, the record demonstrates that all this evidence was before the trial court when it exercised its sentencing discretion: Trial counsel pointed out in his sentencing memorandum that defendant had suffered prior convictions in 1992 and “has never since suffered even an arrest for similar conduct.” Trial counsel also disputed the People’s assertion that defendant had performed poorly on parole, noting that defendant’s “ ‘RAP’ sheet does not indicate any parole violations.” Moreover, the probation report fully appraised the court regarding defendant’s SARATSO score, and the trial court was in pole position to observe defendant’s demeanor throughout trial and sentencing. It cannot

counsel's performance fell below an objective standard of reasonableness. (See *People v. MacKenzie, supra*, 34 Cal.App.4th at p. 1272.) Accordingly, his IAC claim fails.

DISPOSITION

The judgment is affirmed.

Jenkins, J.

We concur:

Pollak, Acting P. J.

Siggins, J.

be said counsel's performance fell below "an objective standard of reasonableness under prevailing professional norms" for failure to reiterate information he had already supplied to the court or knew the court had from another source. (*Strickland, supra*, 466 U.S. at 688.)