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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

THAI YANG,

Defendant and Appellant.

B241802

(Los Angeles County
Super. Ct. No. NA091097)

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

Eileen M. Rice, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant, Thai Yang, of second degree burglary of a vehicle. (Pen. Code, § 459.) Defendant admitted that three section 667.5, subdivision (b) prior separate prison term allegations (case Nos. NA052264, NA033117, NA069839) were true. He also admitted that one sections 667, subdivisions (b) through (i) and 1170.12 prior serious felony conviction allegation (case No. NA03317) was true. Defendant was sentenced to nine years in state prison. (§ 1170, subd. (h)(3).) The trial court imposed the high term for the burglary. In doing so, the trial court stated, “The record should reflect that the court is imposing the high term on count one based on the fact that the defendant was and has been multiple convicted felon, went to prison three separate times, last time being 2006 for a term of 32 months.”

Defendant contends the trial court’s reliance on his prior record to both impose the high term and enhance his sentence under section 667.5, subdivision (b), constituted an improper dual use of facts. (§ 1170, subd. (b); Cal. Rules of Court, rule 4.420(c); *People v. McFearson* (2008) 168 Cal.App.4th 388, 395; 3 Witkin, Cal. Criminal Law (4th ed. 2012) Punishment, § 404, p. 624.) Defendant forfeited this assertion by failing to raise it in the trial court. (*People v. Murphy* (2001) 25 Cal.4th 136, 156; *People v. Scott* (1994) 9 Cal.4th 331, 350-353; see *People v. Neal* (1993) 19 Cal.App.4th 1114, 1117-1124.) Defense counsel had a meaningful opportunity to object when the trial court stated its reasons for imposing the high term. (See *People v. Gonzalez* (2003) 31 Cal.4th 745, 748, 751-755; *People v. Zuniga* (1996) 46 Cal.App.4th 81, 84.)

Even if the issue were properly before us, we would not find it reasonably probable a more favorable sentence would have been imposed absent the error. (*People v. Davis* (1995) 10 Cal.4th 463, 552; *People v. Avalos* (1984) 37 Cal.3d 216, 233.) The probation officer’s report notes: “The defendant seems to be well acquainted with the criminal court system as his record reflects several convictions for felony offenses and previous detention in facilities on the state level. The present matter indicates a pattern of delinquent behavior and blatant disregard for the law. [Defendant’s] actions suggest he has not learned from prior court interactions which includes involvement in serious offense. In addition, the defendant also has ties to criminal street gang known for their

violent and destructive behavior in the community. Clearly, there are concerns regarding potential risk to the community.”

Moreover, according to the probation officer’s report, the crime left the victim and his girlfriend very fearful and contemplating securing a protective order. Defendant was tampering with the victim’s Honda. As the victim approached, defendant got into a Toyota and drove away. Defendant then drove past the victim’s residence several times. On the second occasion, defendant “flipped off” the victim. On the third occasion, defendant got out of his Toyota. Defendant approached the victim’s residence. The victim’s girlfriend and young children resided in the home. Further, defendant’s prior convictions were of increasing seriousness. In 1993, as a juvenile, he committed a petty theft and was placed home on probation. In 1997, he committed robbery and was sentenced to two years in state prison. In 2002, he committed a burglary and was sentenced to four years in state prison. Under these circumstances, it is not reasonably probable the trial court would impose less than the high term. Defendant’s ineffective assistance of counsel claim therefore also fails. (See *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1265-1266; *People v. Bautista* (1998) 63 Cal.App.4th 865, 871.)

The judgment is affirmed.

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TURNER, P. J.

We concur:

MOSK, J.

KRIEGLER, J.