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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JAMAR LEE HENDRIX, Defendant and Appellant.	D073494 (Super. Ct. No. SCD268492)

APPEAL from a judgment of the Superior Court of San Diego County, Joan P. Weber, Judge. Affirmed.

Rachel M. Ferguson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Junichi P. Semitsu, Deputy Attorneys General, for Plaintiff and Respondent.

Jamar Hendrix pled guilty to one count of assault by means of force likely to result in great bodily injury (Pen. Code, § 245, subd. (a)(4))[1] and admitted the allegation that he personally inflicted great bodily injury (§ 12022.7, subd. (a)). The trial court sentenced him to seven years in prison and ordered him to pay various fines and fees.

On appeal, Hendrix contends the trial court violated his due process, trial, and statutory rights by denying his requests to speak during the sentencing hearing. We conclude Hendrix forfeited this claim because he did not ask to speak until after the court had begun pronouncing his sentence. (See *People v. Evans* (2008) 44 Cal.4th 590, 600 (*Evans*) [defendant's request to speak "came too late; it should have been made before the court started to pronounce [the] defendant's sentence"].) And, in any event, any error was harmless for a variety of reasons.

Hendrix also contends the trial court erred by failing to consider his ability to pay the fines and fees it imposed. We conclude he forfeited this challenge by failing to raise it during sentencing.

FACTUAL AND PROCEDURAL BACKGROUND

Underlying Offense

According to the probation officer's report, Hendrix was captured on surveillance footage punching and kicking a man numerous times, causing the man to fall. Hendrix then kicked, punched, and stomped on the man, causing him to lose a tooth and break an ankle.

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

Hendrix was arrested and charged with two offenses: assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)), with a great bodily injury enhancement allegation (§ 12022.7, subd. (a)); and battery with serious bodily injury (§ 243, subd. (d)). The prosecution alleged Hendrix had sustained six probation-denial priors and three prison priors, and that his instant offenses were "serious" (§ 1192.7, subd. (c)(8)) and rendered him presumptively ineligible for probation (§ 1203, subd. (e)(3)).

Guilty Plea

After initially pleading not guilty, Hendrix later entered into a plea bargain under which (1) he agreed to plead guilty to the aggravated assault count and admit the great bodily injury enhancement allegation, (2) the balance of charges and allegations would be dismissed, and (3) the trial court would sentence him. The court accepted Hendrix's guilty plea and enhancement admission, finding he "knowingly and voluntarily waived his rights with knowledge of the charges and the consequences of th[e] plea."

The trial court set a sentencing hearing and ordered Hendrix "to report immediately to [the] probation department for [an] interview." (Capitalization omitted.)

Probation Reports

Hendrix reported to the probation department to initiate the interview paperwork, but did not respond to subsequent communications from the probation officer or attend the scheduled interview. Therefore, the probation officer prepared an initial report without the benefit of having interviewed Hendrix.

The probation report detailed Hendrix's extensive criminal history. As a juvenile, Hendrix sustained true findings both for felonies (robbery and aggravated assault) and misdemeanors (battery, false personation, truancy, and probation violations). As an adult, he sustained more than 14 convictions in about 15 years, including convictions for numerous drug offenses, and felony convictions for battery by a prisoner, resisting an executive officer, and carrying a concealed dirk or dagger. Hendrix performed poorly on probation and postrelease community supervision.

Hendrix failed to appear at the scheduled sentencing hearing. The trial court issued a bench warrant, and Hendrix was arrested about eight months later.

In a supplemental report, the probation officer advised that Hendrix refused to be interviewed. The probation officer opined Hendrix was not "suitable" for probation—he was presumptively ineligible, there were no circumstances supporting a grant of probation, and there were numerous circumstances supporting a denial.

As for Hendrix's sentence, the probation officer reported there were no circumstances in mitigation, whereas there were many factors in aggravation—the crime "disclos[ed] a high degree of viciousness," Hendrix "engaged in violent conduct that indicates a serious danger to society," Hendrix's "prior convictions as an adult are numerous," Hendrix "served a prior prison term," and his "prior performance on probation was unsatisfactory." Accordingly, the probation officer recommended that the trial court impose the upper term of four years for the aggravated assault conviction and three years for the great bodily injury enhancement.

Sentence

At the sentencing hearing, the trial court imposed the upper term of four years on Hendrix's aggravated assault conviction, and imposed a consecutive three-year term for the great bodily injury enhancement. The court also ordered Hendrix to pay the following fines and fees: a restitution fine of $2,100 (§ 1202.4);[2] a court security fee of $40 (§ 1465.8); a court facilities assessment of $30 (Gov. Code, § 70373); and a criminal justice administration fee of $154 (Gov. Code, § 29550 et seq.).

I. *Request to Speak at Sentencing*

Hendrix contends the trial court improperly denied his requests to speak during the sentencing hearing, thereby violating his "right to allocution under section 1204 and his federal and state rights to present a complete defense and to due process." We disagree. Under controlling Supreme Court precedent, Hendrix forfeited his right to address the court by not asking to do so until after the court had already begun pronouncing his sentence. (*Evans*, *supra*, 44 Cal.4th at p. 600.) And even if the court had erred, the error was harmless on this record.

A. *Background*

At the outset of the sentencing hearing, Hendrix's counsel waived arraignment and stated there was "[n]o legal cause" why sentence could not be pronounced.

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2 The court also imposed but stayed a corresponding supervision-revocation fine of $2,100. (§ 1202.45.)

Defense counsel then advised the court that Hendrix had just indicated he wanted to rescind his guilty plea. Hendrix told the court he "was coerced into basically signing this deal." The judge reminded Hendrix that she had presided over his change of plea and that he had confirmed he "understood it and that it was [his] intention to plead guilty." At the court's request, defense counsel confirmed he had gone over the change of plea form with Hendrix. As the court began to explain its ruling, Hendrix repeatedly interjected and interrupted. The court ultimately found "no basis for a withdrawal of the plea."

Turning to sentencing, defense counsel asked the court to impose the three-year middle term because the "vast majority" of Hendrix's "somewhat sordid criminal history" consists of drug-related offenses, emphasizing "[t]here's virtually nothing that has anything to do with violence." Defense counsel also submitted a letter from Hendrix's aunt, which the court reviewed.

The prosecutor countered that defense counsel's characterization of Hendrix's extensive criminal history as not having "any violence" was "unfair." Emphasizing that the instant offense was unprovoked, the prosecutor asked the court to impose the four-year upper term on the conviction and three years on the enhancement. With that, the prosecutor "would submit."

At this point, Hendrix directly asked the court to clarify the relationship between his underlying offense and the enhancement; the court did so.[3]

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3 The following exchange took place:

The court then granted defense counsel's request to "respond to the People's argument very briefly." Defense counsel clarified that he had not intended to suggest that Hendrix "didn't have *any* violence in his adult record but rather that it was largely related to substance abuse." (Italics added.) After elaborating further, defense counsel concluded, "So that's what I'm asking the Court to consider as it relates to my request for the mid term versus the upper term."

The court began to pronounce sentence, and the following exchange ensued:

> "THE COURT: Okay. And thank you for so vigorously representing your client under these circumstances.
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> "For me, my major issue is Mr. Hendrix has shown in almost every aspect of this case his disregard for the system. He doesn't show for his probation interview. He won't be interviewed by the probation department.
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> "I . . . would normally not give an upper term in a case where a person has pled guilty prior to trial. This case, though, with him just thumbing his nose at the Court by not showing up and had to be arrested and brought in and everything that has occurred with regard to this case and his 20-year criminal history, I think I've got to agree with the probation department that the upper term is appropriate.
>
> "THE DEFENDANT: Your Honor, can I say something?
>
> "THE COURT: He's already getting the benefit of the fact that . . . he did not have to have [the prison priors imposed,] which would

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> "THE DEFENDANT: Your Honor, can I say something? When it's likely to cause GBI, how do you get a[n] upper term when that's the assault and battery? . . .
>
> "THE COURT: The crime is that the assault was likely to produce great bodily injury, and then there's an additional allegation that you did, in fact, impose great bodily injury. That's what you get the extra three years for is actually committing the great bodily injury."

have added an additional three years if he had gone to trial on the matter.

"So, Mr. Hendrix, you know, you seem to love your family, and all I can say to you is at 33 years of age I hope that you look back there and you see the people that support you and love you.

"THE DEFENDANT: Can I say something, Your Honor?

"THE COURT: No, you can't right now, Mr. Hendrix. Now is the Court's time to talk. And I don't know if any judge has tried to speak to you, but I'm here to say to you that given your 20-year criminal history, judges are going to start throwing the book at you, and you need to be aware . . . with this great bodily injury allegation, you now have a strike.

"THE DEFENDANT: How is that great bodily injury for self-defense? This man shot upon me. I can't be violent if I go talk to this man three or four times. So I don't understand that. I'm never going to understand that. And when she said a battery in 2002, it wasn't a battery. It's obstructing and resisting, let the record reflect. And for the battery in prison, all I was doing was resisting the guy. If you read with what's his name, he can tell you that it was accident. It's just a battery because you bumped a person.

"THE COURT: I just want you to be aware, sir—

"THE DEFENDANT: Nothing violent.

"THE COURT: —if you commit a subsequent felony when you are released in this case, that any sentence will be doubled and that you will be serving 80 percent of any custody imposed. So it's gotten very serious now, and if you ever want to see that child again, you need to start thinking about your life and the decisions that you have made.

"In this matter, probation will be denied. The defendant will be committed to the Department of Corrections for the term of seven years. . . . He is to pay the fines and fees as indicated on Page 7 [of the supplemental probation report]. The Court is imposing, on Count 1, the upper term of four and three years for the GBI allegation for a total commit of seven years. And that will be the order."

B. *Relevant Legal Principles*

In *Evans*, *supra*, 44 Cal.4th 590, the California Supreme Court traced the evolution of a defendant's right to address the court at sentencing. (*Id.* at pp. 594-597.) Having its roots in common law, the right of "allocution" in California is now governed by statute. (*Ibid*.) As the *Evans* court clarified, there are two forms of allocution—it "has traditionally meant the *trial court's inquiry of a defendant* as to whether there is any reason why judgment should not be pronounced," but more recently "has often been used for *a mitigating statement made by a defendant in response to the court's inquiry*." (*Id.* at p. 592, fn. 2.)

The right of traditional allocution is codified in sections 1200 and 1201,[4] which provide that a defendant must be arraigned at sentencing and be given the opportunity to state "any legal cause to show why judgment should not be pronounced," the reasons for which are limited to insanity, or entitlement to an arrest of judgment or a new trial. (*Evans*, *supra*, 44 Cal.4th at p. 594.) A "mitigating statement by [the] defendant is not 'legal cause to show why judgment should not be pronounced,' and thus does not come within the" scope of section 1200's traditional allocution scheme. (*Evans*, at p. 597.)

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4 Section 1200 provides: "When the defendant appears for judgment he must be informed by the court, or by the clerk, under its direction, of the nature of the charge against him and of his plea, and the verdict, if any thereon, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him."

Section 1201 provides in part: "He or she may show, for cause against the judgment: [¶] (a) That he or she is insane . . . . [¶] (b) That he or she has good cause to offer, either in arrest of judgment or for a new trial . . . ."

Instead, as the *Evans* court explained, the defendant's right to make a mitigating statement is governed by section 1204, which provides: "The circumstances [in aggravation or mitigation of punishment] shall be presented by the testimony of witnesses examined in open court . . . ." (See *Evans*, 44 Cal.4th at p. 598.) "By stating in section 1204 that mitigating evidence must be presented through 'the testimony of witnesses examined in open court' rather than verbal representations, the Legislature has declared that a criminal defendant wishing to make an oral statement to the court in mitigation of punishment must do so through testimony given under oath." (*Ibid*.) The *Evans* court concluded that the opportunity afforded by section 1204 satisfies a defendant's federal due process rights. (*Evans*, *supra*, 44 Cal.4th at p. 600.)

Applying these principles to the facts before it, the *Evans* court held the defendant forfeited his right to give a sworn statement in mitigation because he did not assert it until after the court had already begun to pronounce his sentence. (*Evans*, *supra*, 44 Cal.4th at p. 600.) The sentencing hearing began with the traditional allocution and the defense acknowledgment there was " '[n]o legal cause' " why sentence could not be pronounced. (*Id.* at p. 593.) Defense counsel asked the court to grant probation in light of the defendant's drug addiction, to which the prosecutor replied it was " 'too late' " in light of the defendant's squandered opportunities for treatment. (*Ibid*.) "After a brief discussion of whether the court should order restitution to the victim, the trial court asked, 'With that, the matter's submitted, correct?' Defense counsel replied, 'Submitted.' " (*Ibid*.)

"The trial court then agreed with the prosecutor that defendant did not 'deserve the opportunity' for probation, . . . and he ultimately was sentenced to 16 months in prison.

The court formally denied defendant's request for probation, found no good cause to dismiss defendant's prior 'strike,' and ordered defendant 'committed to the Department of Corrections.' At this point, defendant interjected: 'Can I speak, your [H]onor?' The trial court replied, 'No.' It then imposed a five-year prison sentence." (*Evans*, *supra*, 44 Cal.4th at p. 593.)

On these facts, the *Evans* court held "there was a forfeiture of [the] defendant's right to testify in mitigation of punishment." (*Evans*, *supra*, 44 Cal.4th at p. 600.) Before the matter was submitted to the court, "[d]efense counsel made no attempt to call [the] defendant to testify, and [the] defendant himself did not ask to do so." (*Ibid*.) "It was only after the trial court had denied probation and was in the process of sentencing defendant to prison that defendant asked, 'Can I speak, your [H]onor?' Assuming for the sake of argument that this may be construed as a request to testify in mitigation of punishment, it came too late; it should have been made before the court started to pronounce [the] defendant's sentence." (*Ibid*.)

C. *Analysis*

Evans applies here and is controlling. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) As in *Evans*, the sentencing hearing began with the traditional allocution and response that there was "[n]o legal cause" why sentencing could not proceed; defense counsel and the prosecutor argued their respective sentencing positions; the matter was submitted to the trial court for decision; the trial court began to pronounce sentence; and only then did Hendrix ask to "say something" to the court. By

waiting until then to ask, Hendrix forfeited his right to give a sworn personal statement in mitigation.[5]

We are unpersuaded by Hendrix's attempts to distinguish *Evans*. First, Hendrix observes that, unlike the defense counsel in *Evans*, his counsel did not say the word "submitted." This distinction is immaterial. The record shows the matter had, in fact, been submitted. Hendrix's counsel argued in mitigation; the prosecutor responded; Hendrix, himself, addressed the court; and defense counsel "respond[ed] to the People's argument very briefly" before summing up with the statement, "So that's what I'm asking the Court to consider as it relates to my request for the mid term versus the upper term." It is beyond doubt that the matter had been submitted to the court for decision before Hendrix asked to "say something."

Second, Hendrix points out that the trial court in *Evans* had already denied probation before the defendant asked to address the court (*Evans*, *supra*, 44 Cal.4th at p. 593), whereas the trial court here had merely begun stating the reasons it was likely to deny probation and impose the upper term. Again, this distinction is immaterial. The cut-off for a defendant to invoke the right to give a sworn statement in mitigation is when "the court *start*[*s*] *to pronounce* [the] defendant's sentence." (*Id.* at p. 600.) That occurred here when the court began explaining why it was going to follow the probation officer's sentencing recommendation.

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5 As in *Evans*, we will assume without deciding that Hendrix's request to "say something" constituted "a request to testify in mitigation of punishment" in accordance with section 1204. (*Evans*, *supra*, 44 Cal.4th at p. 600.)

In sum, the opportunity afforded by section 1204 to give a sworn statement in mitigation protected Hendrix's due process rights. (*Evans*, *supra*, 44 Cal.4th at p. 600.) However, because Hendrix's invocation of that right was untimely, he forfeited it. (*Ibid*.) Accordingly, the trial court did not err.

Even if the trial court had erred, Hendrix has not met his burden on appeal of showing the error was prejudicial. Hendrix was represented at sentencing by competent counsel who—in the trial court's words—"vigorously represent[ed]" him. Before the court began to pronounce sentence, Hendrix directly addressed the court, and the court responded. And even after the court began to pronounce sentence and denied Hendrix's request to speak again, the court allowed him to speak again, at which point he explained his prior crimes of violence were in self-defense and for merely "resisting [a] guy." Only after hearing from Hendrix did the court formally pronounce his sentence. Hendrix has given us no indication of what additional information he was precluded from conveying to the court, or how it would have favorably affected the trial court's sentencing decision. Accordingly, he has not met his burden of showing prejudice under any standard.

II. *Challenge to Fines and Fees*

As noted, the trial court ordered Hendrix to pay the following fines and fees: a restitution fine of $2,100 (§ 1202.4); a court security fee of $40 (§ 1465.8); a court facilities assessment of $30 (Gov. Code, § 70373); and a criminal justice administration fee of $154 (Gov. Code, § 29550 et seq.).

In a supplemental brief, Hendrix contends the trial court erred by imposing these fines and fees without first determining whether he had the ability to pay them. He bases

this contention on the recent decision in *People v. Dueñas* (2019) 30 Cal.App.5th 1157, which held that imposing fines and fees on a defendant who is unable to pay them violates constitutional due process. Hendrix acknowledges he did not object to the fines and fees during sentencing, but maintains he has not forfeited his challenge because *Dueñas* was not decided until after he was sentenced and the "decision presents a dramatic and unforeseen change in the law governing assessments and restitution fines." On the record before us, we conclude Hendrix forfeited this challenge.

Notably, the statutes authorizing $2,254 of the $2,324—about 97 percent—of the fines and fees Hendrix now challenges authorized the trial court to consider Hendrix's ability to pay. First, by imposing a restitution fine of $2,100 under section 1202.4, the trial court exceeded the $300 minimum fine, thereby authorizing the court to consider Hendrix's "[i]nability to pay." (§ 1202.4, subd. (c).) Second, the $154 criminal justice administrative fee imposed under Government Code section 29550 et seq. is mandatory "[i]f the person has the ability to pay" it. (Gov. Code, § 29550.2.)

Hendrix's silence during sentencing in the face of $2,254 in fines and fees he could have challenged on the basis of his alleged inability to pay "is a classic example of the application of the forfeiture doctrine relied upon by the California Supreme Court in numerous criminal sentencing cases decided well before *Dueñas*." (*People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033, citing *People v. Aguilar* (2015) 60 Cal.4th 862, 864 [applying the forfeiture rule to challenges to probation-related costs and an order for reimbursement of fees paid to appointed trial counsel]; *People v. Trujillo* (2015) 60 Cal.4th 850, 853-854 [applying the forfeiture rule to an unpreserved claim regarding

probation-related fees and defendant's inability to pay them]; *People v. Nelson* (2011) 51 Cal.4th 198, 227 [defendant's claim that the trial court erred by failing to consider ability to pay a restitution fine is forfeited by the failure to object].)

DISPOSITION

Affirmed.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

GUERRERO, J.