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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RAFAEL CHAVEZ,

Defendant and Appellant.

E053225

(Super.Ct.No. SWF029904)

OPINION

APPEAL from the Superior Court of Riverside County. Angel M. Bermudez, Judge. Affirmed.

Mark Yanis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Garrett Beaumont and Jennifer A. Jadovitz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant is serving two years eight months in state prison after pleading guilty to three counts of attempted arson (Pen. Code, § 455) and one count of possessing

combustible material with the intent to set fire to a structure (Pen. Code, § 453, subd. (a)). In this appeal, defendant's sole contention is that the trial court erred by denying him his due process right, rooted in the common law, to allocution at sentencing. As discussed *post*, we conclude this argument is singularly without merit and, so, affirm the judgment.

STATEMENT OF FACTS AND PROCEDURE

The parties agree that the facts and circumstances of defendant's crime are not relevant to his claim on appeal and we too omit them.

In an amended information filed on December 6, 2010, the People charged defendant with three counts of attempted arson and one count of possessing combustible material with the intent to set fire to a structure. On that same date, defendant pled guilty to all counts and was sentenced to two years eight months in state prison. This appeal followed.

DISCUSSION

Defendant argues that the trial court prejudicially erred when it denied him the right to allocute or speak directly to the court seeking mitigation at sentencing.

Defendant acknowledges *People v. Evans* (2008) 44 Cal.4th 590, holds that a defendant has no federal due process right to address the court at sentencing. However, defendant contends the *common law* right to allocution is not addressed in *People v. Evans* and, thus, his claim is not precluded by that case.

While acknowledging the more general and historical sources on the right to allocution included in defendant's opening brief, we have reviewed the newer federal cases, upon which defendant relies for his argument that the trial court's failure here to

affirmatively invite defendant to personally address the court at sentencing requires the conviction to be reversed. Specifically, we have reviewed *Boardman v. Estelle* (9th Cir 1992) 957 F.2d 1523 at page 1526, superseded by statute on another ground as stated in *Rikard v. Harrington* (E.D.Cal. Oct. 16, 2009) 2009 U.S. Dist. Lexis 96959, which involved a defendant who specifically asked to address the court and, so, is not applicable here. We also reviewed *United States v. Adams* (3rd Cir. 2001) 252 F.3d 276, 288-289, which involved the application of Federal Rules of Criminal Procedure, former rule 32(c)(3)(C),¹ requiring the federal court to invite the defendant to personally address the court. The federal rule is not applicable in this state criminal court case and, therefore, the case is also not helpful to defendant's cause.

On appeal, the judgment is presumed to be correct. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.) The appellant therefore has the burden to demonstrate, by legal analysis and citation to authority, that the trial court committed prejudicial error. (*McComber v. Wells* (1999) 72 Cal.App.4th 512, 522-523.) Here, while counsel for defendant has set forth a very nice treatise on the history of the federal United States and English common law regarding the right to allocution, he has failed to establish with sound, relevant, legal authority that this court is required to reverse this judgment.

¹ Federal Rules of Criminal Procedure, former rule 32(c)(3)(C), has been renumbered as rule 32(i)(4)(A)(ii).

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

RICHLI
J.

KING
J.