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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS ARVIZO,

Defendant and Appellant.

F061299

(Super. Ct. No. F09903921)

**OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Edward Sarkisian, Jr., Judge.

Rebecca P. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Sally Espinoza, Deputy Attorneys General, for Plaintiff and Respondent.

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On July 5, 2009, Luis Arvizo (defendant) fatally stabbed Feliciano Martinez. A jury convicted him of second degree murder involving the use of a deadly weapon (Pen. Code,<sup>1</sup> §§ 187, subd. (a), 12022, subd. (b)(1)), and he was sentenced to 15 years to life plus one year in prison. He now appeals, claiming the trial court erred by failing to rule on his objections to the probation officer's report (RPO). We affirm.

### **FACTS**

The prosecution's evidence showed that, beginning at least as early as February 2009, Martinez, who was married, would meet Olga Valencia at an apartment complex where he collected rent and did maintenance work and she cleaned.<sup>2</sup> Although Valencia began living with defendant in March, she apparently remained on friendly terms with Martinez. Martinez frequently telephoned Valencia in the days before his death, and she sometimes called him.

On July 5, Martinez telephoned Valencia numerous times. At one point that afternoon, Martinez was overheard having a loud conversation on his cell phone, after which he was seen worriedly peeking out from the back of the apartment complex. About 20 minutes after Martinez's last call to her, Valencia drove defendant to a location near the apartments. Defendant, who did not appear angry, retrieved gloves from the trunk of the car. He put on the gloves, took a knife, walked to Martinez's location, and stabbed him in the chest, perforating his aorta and killing him. Defendant, who looked agitated and angry when he returned to the car, then disposed of the knife and gloves in a garbage dumpster and drove off with Valencia. Although persons living at the apartment complex where Martinez was killed heard nothing amiss, police found possible signs of a struggle.

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise stated.

<sup>2</sup> Unspecified dates in the statement of facts are to dates in 2009.

Defendant testified that he first came to Fresno in the beginning of June. He met Valencia while working in the fields, and their relationship progressed from friendship to intimacy. He only lived with her for five days, however.

Defendant first saw Martinez outside Valencia's apartment. Her son was telling Martinez to leave. During the argument that ensued, Martinez informed defendant that Martinez and Valencia were lovers. When defendant angrily tried to go around Martinez's truck, Martinez struck him with it and threatened to have him beaten up.<sup>3</sup> Afterward, Valencia told defendant that Martinez wanted to be with her and would not stop bothering her. She said she had never had sex with him.

A couple of days before his death, Martinez telephoned Valencia. When defendant took the phone from her, Martinez said he wanted defendant to lend Valencia to him so he could have sex with her. Defendant got angry and hung up.

On July 5, Valencia told defendant that Martinez wanted to talk to him. Assuming Martinez wanted to resolve their problem, defendant told Valencia to take him to Martinez's location. Defendant brought a knife to the meeting, but only because of Martinez's earlier threats. At the apartment complex, the two men argued about Valencia; Martinez offered to "bathe [defendant] with money" if defendant would lend him Valencia so he could have sex with her. When Martinez continued to say such things about Valencia and to insult defendant, defendant grew angry. The argument turned into a physical scuffle and, when Martinez continued to be insulting and disrespectful, defendant pulled out his knife. Martinez continued saying things to defendant, and that is "what made [defendant] stab him." Defendant was "blinded by anger," and his "head was not well ... because of what" Martinez was saying. Defendant

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<sup>3</sup> Valencia's son confirmed that Martinez struck defendant with his vehicle sometime around July 1.

did not want or intend to kill Martinez. He lunged with the knife, but not toward a specific area of Martinez's body.

Frightened when he saw blood, defendant fled. He threw away the knife and gloves, then left with Valencia. He did not know Martinez was dead until the police interviewed him following his arrest the next day.<sup>4</sup>

### **DISCUSSION**

Sentencing was originally set for October 29, 2010. At that time, the court asked defense counsel if there were any corrections that needed to be made to the RPO. She said no, then waived formal arraignment for judgment and stated there was no legal cause why judgment should not be pronounced. She then requested that certain information obtained from police reports be deleted from the RPO. Specifically, she objected to the following as inadmissible, inflammatory, speculative hearsay, and irrelevant:

“Mr. Sanchez was very upset and stated that he had heard from the victim that he had been fearful of his girlfriend's boyfriend, who had just gotten out of jail.

“Officers then made contact with Sermeno, the 33-year-old daughter of the victim. Miss Sermeno indicated that she was aware that her father had been having an affair with an unknown woman, for approximately four to five years, and that her mother also was aware of the affair. In fact, many family members were aware of the affair, but were unaware of the woman's name. They did know that her boyfriend had recently been released from jail. The daughter also stated that within recent weeks, her father had come to her and her mother and told them that if anything should happen to him, they should send police to look into his girlfriend and his girlfriend's current boyfriend.”

Defense counsel also objected to the following as speculation, irrelevant, “and really pretty far out there hearsay”:

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<sup>4</sup> During the interview, defendant told police it was Martinez who brought the gloves and knife to the meeting. Defendant lied because he did not want to go to jail.

“Homicide detectives responded to the victim’s residence and made contact with the victim’s wife, Consuelo Martinez. Mrs. Martinez stated that her husband was in a car accident in 2005, and he was with a female by the name of Olga Valencia. This is how she found out about the affair. She knows he met her at the apartment complex at 757 North Jackson, where the victim was helping out the owner by collecting rent money. She believed the affair had been going on for approximately three to four years. She also stated that she believed the woman had become upset because the victim was attempting to break off the relationship. She was told that the woman threatened to kill the victim if he left her, because the victim would help her out with money and rent. She stated that the victim stopped working at that complex because of the affair; however, in January of this year, he began to help out at the complex again. On tonight’s date, he was going to the complex to collect money from a female tenant.

“The victim’s wife indicated that a few months ago, the boyfriend of Olga Valencia had confronted the victim and stated that he and Olga are going to work things out and he needs to leave her alone or he was going to do something to him. She believed this boyfriend was not from Fresno and lived somewhere in LA. She also stated that she had seen Olga Valencia when Olga had come to her residence to confront her about the affair. She described Olga as having dyed blond short hair with fair skin, approximately 38 years old.”

Defense counsel further objected to the following as irrelevant and possibly involving “people completely unrelated and a bunch of speculation”:

“When he asked the victim what was going on, the victim told him he uses it. Santiago understood this to mean that he has ‘a woman’ over there. The detective asked Mr. Sanchez if the victim ever told him about any threats he was getting. Mr. Sanchez stated that two years into the affair he saw the victim with a gun and he believed he carried it because of the problems he was having with Olga’s boyfriend.

“Officers then made contact with Isaiah Zuniga who stated that he was aware of the affair his uncle was having, because he was told by his uncle, the victim. He stated that her name was Olga Valencia. On one occasion, the victim asked him if he would change a vehicle’s registration he bought for Olga to his name, which he declined to do. He stated that the victim paid for the vehicle by getting a bigger loan for a Jeep he had bought for himself and that’s how he made payments for her car. He stated that he loaned his uncle approximately \$200.00 to pay for the insurance on his pickup; however, shortly thereafter he needed more money because he gave

the money to Olga. Zuniga told him that he was not going to lend him any more money.”

Defense counsel also asked that certain factors in mitigation be added to the RPO. She observed that, under rule 4.423 of the California Rules of Court, the probation officer found no factors in mitigation relating to the crime. Defense counsel claimed that in fact, the victim was an initiator and/or provoked the incident; in addition, there were unusual circumstances that were unlikely to recur. As for facts relating to defendant, the probation officer found he had no prior record or an insignificant record of criminal conduct, considering the recency and frequency of prior crimes. Defense counsel argued that in addition, defendant had admitted his guilt from the beginning, had always shown remorse, and was motivated by a desire to protect his girlfriend and stand up for her honor.

Discussion then turned to the victim’s family, who were en route to court. When the prosecutor asked that they be allowed to be present before the court actually pronounced judgment, sentencing was continued to November 1, 2010.

At the continued hearing, the following took place:

“THE COURT: All right. I know we went through the report and some comments on Friday. And I’m turning over in my mind whether or not some of those matters, now that everyone is present, need [to] be repeated. And that might be in order. [¶] I did on Friday ask Counsel, first of all, if there’s any additions or corrections to be made to the report. [¶] And, [defense counsel], you made your comments relative to the report. And your views relative to the report. Did you wish to repeat or restate those comments?”

“[DEFENSE COUNSEL]: I don’t believe I need to repeat those comments. [¶] I would like to add though, however, this was a jury trial. And those comments that came into the probation report would not have been allowed into a trial. And so I don’t feel that those facts are relevant.”

“THE COURT: And, for the record, I just want the record to reflect that I will incorporate by reference the entire transcript and proceedings of Friday, October the 30th (sic.), so that the record will be clear that that’s being considered and the record will so reflect. [¶] And regarding that

point, [prosecutor], do you have any comments, or views, or statements to make?

“[PROSECUTOR]: The only thing that I noticed in the probation report, ... it is on page 3, essentially line 10, where the probation officer does acknowledge that the entirety of the circumstances of the offense came from the Fresno Police Department Crime Report. And it lists the number. I think that’s clear. But I’ll submit it on Counsel’s request. And just noting ... that the transcript of the trial is the evidence in this case. And there were some other things that are listed in here that clearly come from the police report.

“THE COURT: All right. I think your respective statements adequately cover that issue relating to the circumstances of the offense, a portion of the probation report.”

The court then turned to the imposition of sentence. Defense counsel again waived formal arraignment for judgment and stated there was no legal cause why judgment should not be pronounced. The court read into the record the letters received from Mrs. Martinez and defendant. Defense counsel confirmed she had nothing she wished to state; after brief comments from the prosecutor, the court denied probation and imposed the sentence mandated by statute. It did not mention circumstances in aggravation or mitigation.

Defendant now contends the trial court erred by failing to rule on his objections to the RPO. Defendant has failed to preserve the issue for appeal. Defense counsel made the requisite objections, but then failed to press for a ruling thereon. “[T]he absence of an adverse ruling precludes any appellate challenge.’ [Citation.] In other words, when, as here, the defendant does not secure a ruling, he does not preserve the point. That is the rule. No exception is available.” (*People v. Rowland* (1992) 4 Cal.4th 238, 259; cf. *People v. Lewis* (2008) 43 Cal.4th 415, 481-482; *People v. Ramirez* (2006) 39 Cal.4th 398, 450; *People v. Ramos* (1997) 15 Cal.4th 1133, 1171.) The reason for this principle is that failure to press for a ruling deprives a trial court of the opportunity to correct

potential error. (*People v. Morris* (1991) 53 Cal.3d 152, 195, disapproved on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

Defendant says that in his case, the trial court had “plenty of opportunity” to correct the purported errors identified by defense counsel, and so forfeiture should not be predicated on counsel’s “failure to bother the judge one more time to address her objection.” It is unclear whether the trial court thought it previously had ruled on the objections and was simply allowing counsel to restate her views now that the victim’s family was present, forgot counsel had made actual objections, or believed allowing both counsel to state their positions was adequate since the court had no discretion as to sentence length. “Either way, it was incumbent on counsel, if [she] wished to pursue the matter, to secure a ruling from the trial court.” (*People v. Lewis, supra*, 43 Cal.4th at p. 482.) The trial court having failed to rule for whatever reason, defense counsel ““was obligated to press for such a ruling and to object to [the RPO’s contents] until [s]he obtained one.”” (*People v. Ramos, supra*, 15 Cal.4th at p. 1171.) Failure to do so forfeited the issue.

Defendant says that if we reach this conclusion, then defense counsel’s failure to secure a ruling constituted ineffective assistance of counsel. The burden of proving ineffective assistance of counsel is on the defendant. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) “To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel’s performance fell below an objective standard of reasonableness, i.e., that counsel’s performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel’s shortcomings. [Citations.] ‘A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ [Citations.]” (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003; see generally *Strickland v. Washington* (1984) 466 U.S. 668, 687-694.)

“A defendant who raises the issue on appeal must establish deficient performance based upon the four corners of the record. ‘If the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal.’ [Citations.]” (*People v. Cunningham, supra*, 25 Cal.4th at p. 1003.) In addition, the defendant “must carry his burden of proving prejudice as a ‘demonstrable reality,’ not simply speculation as to the effect of the errors or omissions of counsel. [Citation.]” (*People v. Williams* (1988) 44 Cal.3d 883, 937.)

We are unable to assess either deficient performance or prejudice on the record before us. Within 60 days after judgment is pronounced, the clerk of the court must mail the transcript of the sentencing proceedings, together with other specified documents, to the prison to which a felon is delivered. (Former § 1203.01; see now § 1203.01, subd. (b)(1).)<sup>5</sup> When classifying a newly received inmate, “all relevant documents available during the reception center process” must be reviewed, although the RPO is the “document of choice” for resolving any conflicting information. (Cal. Code Regs., tit. 15, § 3375, subd. (j)(1), (3).) For each prisoner, the Director of Corrections is required to keep a complete case record, which includes all information received from, inter alia, the courts, and to make those records available to the parole board.

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<sup>5</sup> At the time defendant was sentenced, this requirement was mandatory with respect to all cases in which a prison sentence was imposed. (Former § 1203.01.) It remains mandatory in all cases in which the judgment imposed includes a sentence of death or an indeterminate term with or without the possibility of parole. (§ 1203.01, subd. (b)(1).) In all other cases, the clerk now sends a transcript of the sentencing proceedings only upon written request by the Department of Corrections and Rehabilitation, the inmate, or the inmate’s counsel. (*Id.*, subd. (b)(2).)

(§ 2081.5.)<sup>6</sup> Although the parole board typically considers the RPO prepared in connection with an inmate's conviction in determining whether to grant parole (see, e.g., *In re Shaputis* (2008) 44 Cal.4th 1241, 1247; *In re Taplett* (2010) 188 Cal.App.4th 440, 443), it may also consider other material, including the transcript of the sentencing hearing (see, e.g., *In re Caswell* (2001) 92 Cal.App.4th 1017, 1031).

In light of the foregoing, we are unable to conclude defense counsel could have had no satisfactory reason for failing to secure a ruling on her objections. (See *People v. Bell* (1989) 49 Cal.3d 502, 546.) Recognizing she could not affect defendant's sentence, she may have believed stating her position for the record would be more beneficial to defendant in the long run than pressing for a ruling and running the risk the court would overrule her objections. Moreover, any prejudice is, at this juncture, purely speculative. We cannot say the parole board will consider those portions of the RPO that may be of questionable reliability, are based on multiple levels of hearsay, or may pertain to someone other than defendant.<sup>7</sup> Accordingly, defendant's claim must be rejected on this appeal. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)<sup>8</sup>

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<sup>6</sup> Section 2081.5 refers to the Board of Prison Terms. That entity is presently known as the Board of Parole Hearings. (See *In re Shaputis* (2011) 53 Cal.4th 192, 199, fn. 1.)

<sup>7</sup> For example, several of the objected-to portions of the RPO referred to a boyfriend of Valencia who had just gotten out of jail. The RPO reflected, however, that defendant had no known prior criminal record, at least under the name(s) and date(s) of birth submitted.

<sup>8</sup> Nothing we say precludes defendant from filing a petition for writ of habeas corpus, alleging ineffective assistance of counsel, in the superior court. (See *People v. Mendoza Tello, supra*, 15 Cal.4th at p. 267.) While we express no opinion concerning the merits of such a petition, we note that a court's power on habeas extends to disposing of the matter "as the justice of the case may require' [citations]." (*In re Crow* (1971) 4 Cal.3d 613, 619.) This would appear to include excising material from or adding material to the RPO, or remanding the matter to the trial court for a hearing on defendant's objections to that document.

**DISPOSITION**

The judgment is affirmed.

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DETJEN, J.

WE CONCUR:

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LEVY, Acting P.J.

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POOCHIGIAN, J.