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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

BILLY ROMERO,

Defendant and Appellant.

G048408

(Super. Ct. No. 12HF0625)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Dan McNerney, Judge. Affirmed.

Theresa Osterman Stevenson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood and Amanda E. Casillas, Deputy Attorneys General, for Plaintiff and Respondent.

An information charged Billy Romero with five counts of automobile burglary (Pen. Code, §§ 459, 460, subd. (b); counts 1, 3-6; all further statutory references are to the Pen. Code) and one count of grand theft (§ 487, subd. (a); count 2), crimes allegedly committed for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)). The information also alleged one count of street terrorism (§ 186.22, subd. (a); count 7).

A jury found Romero guilty of counts 1 through 6, but found the gang enhancement allegations not true. The trial court dismissed count 7 at the conclusion of the People's case. Romero challenges the trial court's conduct of his sentencing hearing. We find no error and affirm the judgment.

FACTS

The facts of the underlying crimes are not at issue and may be briefly stated. In December 2010 and February 2011, Romero committed several auto burglaries. A detective from Newport Beach testified that there had been an "epidemic" of sophisticated automobile burglaries. According to the detective, the thieves gain entry into large SUV's with minimal damage to the exterior locks. They then remove the SUV's navigation systems and third row seats because neither part bears a vehicle identification number or other identifying number, and they removed these items with minimal damage to the SUV. DNA evidence linked Romero to the sole December 2010 automobile burglary, and to two of the four February 2011 auto burglaries. The other two auto burglaries had been committed in close proximity to the two linked to Romero through DNA evidence, and they had been committed in the same way and on the same day.

The relevant facts occurred after the entry of the verdicts and at the subsequent sentencing hearing. First, immediately after entry of the verdicts, Romero waived his right to the preparation of a probation report. (§ 1203, subd. (b); *People v. Magee* (1963) 217 Cal.App.2d 443, 475-476.) Romero did not request immediate

sentencing. Instead, counsel sought a sentencing hearing within approximately 60 days, a request the trial court granted.

During that 60-day time period, the People filed a sentencing brief. Romero did not. The People's sentencing brief asserted the relatively youthful, 19-year-old Romero's extensive juvenile record, pattern of escalating criminal behavior, and lack of remorse supported the trial court's imposition of an aggravated term of five years and eight months. The People also suggested Romero serve a minimum of three years in custody with the remaining two years and eight months to be served on mandatory supervision, a so-called split sentence under the Criminal Justice Realignment Act of 2011 (Realignment Act; Stats. 2011, ch. 15.)

At the sentencing hearing, the trial court briefly recounted Romero's waiver of a probation report and decision to not file a sentencing brief. The court then inquired, "Any other matters either side is asking the court to consider?" The prosecutor said no. Defense counsel stated, "Yes, your honor. Mr. Romero would like to make a statement to the court." The trial court replied, "Denied." Defense counsel said, "Sorry?" Counsel's request for clarification engendered this response from the trial court, "That request is denied." At which point, defense counsel said, "Okay. Then I'm ready for argument."

What followed was defense counsel's plea for a midterm sentence on the principal term, primarily based on Romero's lack of an adult record, the relatively small amount of the loss, under \$10,000, and counsel's belief Romero's crimes were not sophisticated. After hearing argument, the trial court engaged defense counsel in the following colloquy: "The Court: Waive arraignment for judgment? [¶] [Defense

counsel]: Yes. [¶] The Court: Any legal cause why sentence should not be imposed?”
[¶] [Defense Counsel]: No legal cause.”¹

Despite the comments of Romero’s attorney, the trial court observed, “these crimes were within this class of crime of auto burglary are as sophisticated as I have ever seen in almost 30 years in working the criminal justice system.” The court further observed that Romero “is a professional thief,” and that he had been a thief since his early teens. Moreover, the trial court concluded Romero had become “even more competent and more sophisticated” with time. Ultimately, the court stated, “That’s discouraging that a young industrious young man, as Mr. Romero is, would devote his industry to victimizing property of other people. And I’m unable to find any mitigation with respect to any of these offenses. I’m unable to find mitigation because even though he’s 19 years old when he commits this string of auto burglaries, he is much older in terms of experience as a professional thief and extremely sophisticated.”

At the conclusion of these remarks, the trial court imposed the aggravated term of five years and eight months as suggested in the People’s sentencing brief. The trial court declined to order Romero’s time split between custody and mandatory supervision, observing “the court does not share the prosecution’s optimism [that] the probation department would be successful in collecting restitution during any term of probation.”

About two weeks after the sentencing hearing, Romero filed a *propria persona* notice of appeal. In a statement attached to his notice of appeal, Romero asserted his trial judge was not impartial, the deputy district attorney assigned to prosecute his case had told lies and half-truths in the sentencing brief, and these lies and half-truths

¹ Section 1200 states, “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.”

improperly affected the sentence imposed, making it “to[o] severe.” Romero also expressed remorse for his actions and a willingness to “make amends for any wrong doing and damages”

Defense counsel also filed a timely notice of appeal, noting only that it was an appeal after a jury trial.

DISCUSSION

Romero claims the trial court violated his statutory right to allocution² and his constitutional right to due process of law by not permitting him to speak at the sentencing hearing. He relies primarily on *Boardman v. Estelle* (9th Cir. 1992) 957 F.2d 1523 (*Boardman*). The Attorney General counters that Romero forfeited his right to give a statement by failing to request the court take his sworn testimony at the sentencing hearing. Relying on *Evans* and section 1204,³ the Attorney General asserts California’s statutory scheme provides criminal defendants the right to speak at sentencing only by way of sworn testimony that is subject to cross-examination. There is no right to make an informal statement in mitigation of sentence. In the alternative, the Attorney General asserts Romero suffered no prejudice as a result of any error on the trial court’s part. We agree with the Attorney General.

² “In legal parlance, the term ‘allocution’ has traditionally meant the *trial court’s inquiry of a defendant* as to whether there is any reason why judgment should not be pronounced. [Citations.] In recent years, however, the word ‘allocution’ has often been used for a *mitigating statement made by a defendant in response to the court’s inquiry*. [Citation.]” (*People v. Evans* (2008) 44 Cal.4th 590, 592, fn.2 (*Evans*); italics in original.)

³ Section 1204 states, in pertinent part, that evidence in aggravation or mitigation shall be submitted to the trial court as follows: “The circumstances shall be presented by the testimony of witnesses examined in open court, except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county, out of court, upon such notice to the adverse party as the court may direct. No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court, or a judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the preceding section.”

In *Evans*, after discussing the appropriate sentence, defense counsel stated, “Submitted.” (*Evans, supra*, 44 Cal.4th at p. 593.) During the pronouncement of judgment, the defendant asked, “Can I speak, your honor?” The trial court replied, “No.” (*Ibid.*) The Supreme Court noted, “Defense counsel made no attempt to call defendant to testify, and defendant himself did not ask to do so.” (*Id.* at p. 600.) It concluded, “Under these circumstances, there was a forfeiture of defendant’s right to testify in mitigation of punishment.” (*Ibid.*) Finally, the court stated: “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 honor?’ 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 defendant’s sentence. [Citations.]” (*Ibid.*)

The California Supreme Court then discussed a criminal defendant’s right to address the court at sentencing. It held that, under sections 1200 and 1201, a defendant has a statutory right to state reasons why judgment should not be pronounced at all, but not a right to state reasons why a more lenient judgment should be pronounced. (*Evans, supra*, 44 Cal4th at p. 597.) In addition, under section 1204, a defendant does have a statutory right to state why a more lenient judgment should be pronounced. However, the right to make a statement in mitigation is limited to those made under oath and subject to cross-examination. (*Id.* at p. 598.) And, the California Supreme court concluded there is no federal due process right to informally make a statement in mitigation at sentencing. (*Id.* at p. 600.)

Thus, under *Evans*, Romero, who may or may not have forfeited his right to give a sworn statement in mitigation, clearly had no right to speak informally at the sentencing hearing. Romero asserts the trial court could have taken an informal statement. While true, the trial court’s ability to exercise its discretion to do something does not create a protectable right on Romero’s part. Moreover, to make an informal

statement in mitigation requires the parties' consent. (*Evans, supra*, 44 Cal.4th at p. 599.) And finally, the California Supreme Court rejected his assertion the federal constitution's due process clause provides anything more.

As noted, Romero relies on *Boardman*. In *Boardman*, a divided panel concluded the denial of a represented criminal defendant's request to speak at sentencing amounted to a denial of due process. (*Boardman, supra*, 957 F.2d at p. 1525.) However, the *Boardman* court also recognized the United States Supreme Court has never so held. (*Id.* at p. 1527.) Further, the *Boardman* majority did not consider California's sentencing scheme as analyzed in *Evans*. As has been previously stated by the United States Supreme Court, "The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus. It is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure." (*Hill v. United States* (1962) 368 U.S. 424, 428.)

Naturally, we find no error because we are bound by *Evans*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) But even assuming error, it must be deemed harmless unless it is reasonably probable that a result more favorable to defendant would have been reached in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Thomas* (1955) 45 Cal.2d 433, 438 [the standard applies to the denial of an opportunity to address the court at sentencing].) Moreover, such a denial has been held harmless if the defendant was represented by counsel who was free to assert reasons why a more lenient judgment should be imposed. (*Thomas*, at pp. 438-439; see also *People v. Billetts* (1979) 89 Cal.App.3d 302, 311.)

Here, defense counsel asserted grounds for a mitigated sentence. The reasons given by counsel, some of those being points Romero claims he should have been

allowed to personally assert, were rejected on the merits by the trial court. Romero claims the trial court deprived him of the opportunity to clarify his prior juvenile record, express mitigating motives for committing the crimes, and demonstrate remorse, circumstances he claims were relevant to the court's imposition of sentence and decision on the issue of a split sentence. However, Romero does not persuasively argue any of these factors, even if personally expressed by him at the sentencing hearing, would have affected the trial court's ultimate sentencing decision.

With respect to Romero's criminal past, the appellate record provides no further insight than the prosecutor's sentencing brief, which was based on a review of Romero's rap sheet. The prosecutor did not rely on multiple criminal convictions to argue her point, she merely recounted Romero's "extensive history of contacts with law enforcement as a juvenile." Romero quibbles with the notion he committed the crimes simply to provide his family with the necessities of life and that he recently developed remorse and a desire to make things right, but these changes may be attributed to getting caught after two years of continued criminal behavior. Moreover, none of these factors yield an objectively reasonable belief Romero would achieve a more lenient sentence at a new sentencing hearing. As the trial court noted, there were several factors in aggravation that supported the imposition of an aggravated sentence. Only one factor is required to uphold the trial court's sentencing decision. (*People v. Osband* (1996) 13 Cal.4th 622, 730.) Thus, any purported error in the allocution was harmless, and did not violate Romero's federal constitutional right to due process of law.

Romero also argues the trial court abused its discretion by not imposing the split sentence as suggested by the People. We find no merit in this claim either.

Romero bears the burden to show "that the sentencing decision was irrational or arbitrary." (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.) "In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a

particular sentence will not be set aside on review.” (Id. at pp. 977-978, quoting *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831.)

Reasonable minds may differ as to whether a split sentence was appropriate in this case, but that is not enough. A ““decision will not be reversed merely because reasonable people might disagree. “An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.” [Citations.]’ [Citation.]” (*People v. Superior Court (Alvarez)*, *supra*, 14 Cal.4th at p. 978.) There was nothing irrational or arbitrary about the trial court’s decision here. Romero’s attorney argued valiantly on his clients behalf. However, the trial court rejected those arguments. Romero fails to explain how the court’s decision was capricious. In short, Romero provides no compelling reason to discount the trial court’s view of the evidence, regardless of his belated claim to be ready, willing, and able to pay restitution. In short, Romero fails to demonstrate the trial court abused its discretion by ordering his sentence to be served entirely in custody.

DISPOSITION

The judgment is affirmed.

THOMPSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.