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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MARIO CHAVEZ, Defendant and Appellant.	H045378 (Santa Clara County Super. Ct. Nos. C1362854, C1365184)[1]

Defendant entered a no contest plea to an information charging first degree murder of his wife (Pen. Code, §§ 187, 189; count 1), threatening to commit crimes resulting in death or great bodily injury to his two minor children (Pen. Code, § 422; counts 2 and 3), willfully causing or permitting the younger child to suffer (Pen. Code, § 273a, subd. (a); count 4), and exhibiting a deadly weapon in the presence of the younger child (Pen. Code, § 417, subd. (a)(1); count 5). He admitted using a deadly and dangerous weapon (a knife) in the commission of the offenses alleged in counts 1 through 4 (Pen. Code, § 12022, subd. (b)(1)), and being on felony bail when the murder was committed (Pen. Code, § 12022.1). The parties agreed in the negotiated plea that defendant would receive a sentence between 25 and 30 years to life (the potential exposure was 37 years to life). Defendant was sentenced consistent with that agreement to 25 years to life consecutive to four years. He seeks a new sentencing hearing, contending the trial court did not state on

[1] This appeal is subject to an abbreviated form of opinion under Standard 8.1 of the California Judicial Council's Standards of Judicial Administration, incorporated into the California Rules of Court effective January 1, 2007.

the record its reasons for imposing the sentence, as required by Penal Code section 1170, subdivision (c). Failing to preserve his claim in the trial court, we deem it forfeited and will affirm the judgment.

Under the forfeiture doctrine, a claim of error may not be advanced on appeal without first being raised in the trial court. (*People v. Seijas* (2005) 36 Cal.4th 291, 301.) In *People v. Scott* (1994) 9 Cal.4th 331, the California Supreme Court applied the forfeiture doctrine "to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices." (*Id*. at p. 353.) Defendant acknowledges that he did not alert the trial court to any sentencing error. Citing the federal standard for reviewing plain error affecting a defendant's substantial rights discussed in *Rosales-Mireles v. United States* (2018) 138 S.Ct. 1897 (*Rosales-Mireles*), defendant argues that we should not find forfeiture in this case because the claimed error implicates "the fairness, integrity and public reputation of the judicial proceedings."

In *Rosales-Mireles*, the Supreme Court held that the federal appellate court had abused its discretion under Federal Rule of Criminal Procedure 52(b) by failing to remand the defendant's case for resentencing to correct plain error in calculating the sentencing guideline range. (*Rosales-Mireles*, *supra*, 138 S.Ct. at p. 1911.) The court noted, "In the ordinary case, as here, the failure to correct a plain Guidelines error that affects a defendant's substantial rights will seriously affect the fairness, integrity, and public reputation of judicial proceedings." (*Ibid*.) *Rosales-Mireles* is inapposite and does not persuade us to excuse defendant's forfeiture here. The error in *Rosales-Mireles* was a miscalculation that affected the sentencing decision. (*Id*. at p. 1905.) Here, the trial court was not misinformed about its options or the parties' sentencing agreement. Unlike the plain and prejudicial error in *Rosales-Mireles* (*id*. at pp. 1905, 1908), the record here reflects a trial court carefully articulating the reasons for its sentencing choice on the record at the sentencing hearing, completely belying the thrust of defendant's appeal.

Defendant was facing a minimum sentence of 25 years to life for first degree murder, which under the bail enhancement statute would run consecutive to the other offenses. (Pen. Code, § 12022.1, subd. (e).) Exercising its discretion, the trial court sentenced defendant to a mitigated two-year term on court 4, and imposed one-year deadly weapons enhancements on both counts.[2] Before pronouncing sentence, the court stated that it had read and reviewed the probation report, and its tentative decision was to adopt the recommendation set forth in the report and sentence defendant to 25 years to life consecutive to four years. Defendant's attorney argued forcefully for a consecutive two-year sentence instead of the recommended four years, emphasizing defendant's remorse as expressed in a letter handwritten by defendant and read into the record by counsel. Counsel repeated his request after the prosecutor urged the court to follow the probation department's recommendation.

We are troubled by the utter disconnect between the record and the assertions defendant makes on appeal. Counsel has mischaracterized the record in appellant's briefing by describing only the parties' recommendations at the sentencing hearing and entirely ignoring the court's comments supporting the pronouncement of sentence. The court began its comments by acknowledging the thorough work of counsel and the probation department, and the strength and character of defendant's adult daughter who had taken custody of her younger brothers after their mother's murder. The court thanked defendant for speaking with the probation department and expressing his thoughts in writing. It then commented on the "extraordinary brutal, brutal crime" that left defendant's children without a mother, "children hav[ing] endured and seen more violence than anyone should have to endure in a lifetime." The court recognized defendant's ability to acknowledge wrongdoing, but noted that the extraordinary violence

[2] It imposed a concurrent 28-month sentence on count 3 (a mitigated 16-month term plus the weapons enhancement), and stayed the same sentence on count 2 under Penal Code section 654.

inflicted by defendant over time "makes it difficult for the court to get behind your attorney's request that I do anything other than what the probation department has recommended." The court continued: "This was a brutal, awful crime and I do understand you're looking back now and you're saying that you are sorry for what happened. [¶] I believe you are sorry for what happened, but that doesn't change the fact that someone is dead and died a horrible, violent death in front of her children. It doesn't get a lot worse than that. [¶] So I did want you to hear from me as to what I -- how I view things from this neutral chair. This is really the ultimate in very, very bad circumstances. And it just had a horrendous effect on many, many people."

The court stated that it was adopting the prison matrix and as set forth in the probation report, and "the circumstances in aggravation and mitigation as set forth in the probation report in their entirety." The probation report identified three factors in aggravation: (1) "The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness," (2) "The defendant took advantage of a position of trust or confidence to commit the offense," and (3) "The defendant has engaged in violent conduct that indicates a serious danger to society." (Cal. Rules of Court, rule 4.421(a)(1), (11), (b)(1).) Defendant's insignificant criminal history was identified as a mitigating factor. The court added as a mitigating factor defendant's acknowledgment of wrongdoing at an early stage of the proceedings. Defendant waived formal arraignment and affirmed there was no legal cause why sentence should not be imposed. Only then did the court pronounce judgment and sentence defendant to 25 years to life consecutive to four years.

DISPOSITION

The judgment is affirmed.[3]

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[3] We dispose of the petition for writ of habeas corpus filed during the pendency of this appeal (H046027) by separate order filed this day.

Grover, J.

WE CONCUR:

Greenwood, P. J.

Danner, J.