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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JULIO BALVANEDA,

Defendant and Appellant.

B284292

Los Angeles County
Super. Ct. No. GA095466

APPEAL from a judgment of the Superior Court of
Los Angeles County, Stan Blumenfeld, Judge. Affirmed.

James M. Crawford, under appointment by the Court of
Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler,
Chief Assistant Attorney General, Lance E. Winters, Assistant
Attorney General, Stacy S. Schwartz and Pamela C. Hamanaka,
Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Julio Balvaneda of assault with a deadly weapon—a truck—on victim Rayjon Marqui Moore. Balvaneda’s sole contention on appeal is that the trial court denied him his constitutional right to testify on his own behalf. We find no error and affirm.

FACTS AND PROCEDURAL HISTORY

1. *The events of January 1, 2015*

Because Balvaneda does not challenge the evidence against him at trial, we only summarize it briefly.

On January 1, 2015, around 11:00 a.m., Balvaneda, driving a Dodge Ram 1500 truck, sideswiped a Mercedes Benz driven by Rayjon Moore. Moore expected the truck’s driver to pull over to exchange information but the truck made a sudden U-turn—tires screeching—and fled, driving very fast. Moore followed, although it was very difficult for him to keep up with the speeding truck. The truck made turns and ran five or six stop signs.

The truck finally stopped and Moore stopped his car five to ten feet behind it to try to exchange information. A number of people, whom Moore took to be Balvaneda’s family members, got out of the truck. Moore waited inside his car. Balvaneda got out of the truck, walked up to Moore’s car, “balled up” his fists, and shouted, “I am little Mexico.” Balvaneda “swung” his fists into the car through the driver’s side window. Moore moved back to avoid being hit. Balvaneda ran around the car and punched the back window with his fists. Balvaneda then tried to “sock out the front passenger window.”

Balvaneda got back into his truck. He put the truck “in reverse and floored it and the tires were screeching.” Balvaneda rammed Moore’s car twice “pretty hard” with his truck. Moore’s air bag deployed and Moore hit his head. The impact also injured Moore’s ankle; it hurt “pretty badly.” Moore’s windshield broke.

As Balvaneda was about to ram Moore's car a third time, Moore crawled out of his car through the driver's window. Balvaneda then turned his truck around, "floored it," "tires . . . screeching," and tried to hit Moore. Moore moved out of the way. Balvaneda put the truck in reverse, floored it again, and ran into a nearby wall. Moore "took off running." Balvaneda "threw it in drive" and drove off down the street; he appeared to be pursuing Moore. Witnesses called 911.

Balvaneda apparently returned. Police arrived and spoke with him. A responding officer smelled alcohol on Balvaneda's breath. A blood draw later that afternoon showed a blood alcohol level of .18 percent. Balvaneda was driving that day with a suspended license.

Moore's car was totaled.

2. *The charges and trial*

The People charged Balvaneda with two counts of assault with a deadly weapon on Moore.¹ The court arraigned Balvaneda on September 4, 2015. Five successive pretrial conferences followed. On March 17, 2016, Balvaneda failed to appear in court as ordered. The court forfeited his bail and issued a warrant. On April 11, 2016, Balvaneda walked in on the warrant. The court admonished him, rearraigned him, and reinstated his bail. On May 12, 2016, Balvaneda again failed to appear in court as ordered. The court again forfeited his bail and issued a warrant.

Some nine months later, Balvaneda finally was apprehended on the warrant. Five more pretrials followed. The case finally proceeded to trial in late June of 2017.

Moore testified at the trial. Moore was a reluctant witness. When first called to the stand, he answered, "[n]o contest" to

¹ The information refers to the weapon as a "car." As noted, Balvaneda in fact was driving a truck.

every question. The trial court, anticipating a possible contempt proceeding, appointed the public defender's office to advise Moore. Moore later testified but answered, "I am not sure," "I don't remember," and "I don't know" in response to a number of questions.

The prosecution also called as witnesses a motorist who saw the speeding truck and called 911, two bystanders who witnessed the ramming, a traffic collision and skid mark expert, and a police officer who went to the scene.

Balvaneda called his fiancé Aracely Hernandez as a witness. Hernandez testified Moore sideswiped Balvaneda's truck, then threw a chocolate drink at the windshield. Hernandez said Moore was "being very aggressive" and said he was going to kill Balvaneda. Hernandez testified Balvaneda parked his truck and Moore "came out of nowhere with a 2-by-4 and started hitting the truck." Balvaneda also called his 16-year-old stepdaughter and a bystander as witnesses.

3. *The trial court's advisement to Balvaneda of his right to testify*

Midway through the defense case, after Hernandez had finished testifying and outside the jury's presence, the trial court asked defense counsel if the court could address Balvaneda directly. The court said, "Since he may testify or may not, I want to make sure he hears from me." Counsel said that was fine.

The court told Balvaneda,

"Mr. Balvaneda, first of all, you should understand I do this in every single criminal case. I am not trying to direct you or pressure you to do anything. My sole purpose is to make sure you know what your rights are. You have the constitutional right not to testify as I have

already explained in the process to you. I think you know. You are aware.”

Balvaneda answered, “Yes.” The court continued, “You also have a right to testify if you want. Do you understand that as well?”

Balvaneda again answered, “Yes.” The court said, “That decision ultimately is yours and yours alone. No one can force you to testify or not to testify. No one can coerce or pressure you to testify or not to testify. Do you understand that?” Again, Balvaneda said, “Yes.”

The court told Balvaneda, “You are free to listen to counsel’s advice. Ultimately you are going to have to make the decision. You can consider the advice and you can accept it or reject it. The ultimate decision is yours as to whether you wish to testify.” The court asked, “Am I being clear to you, sir? Just answer yes or no. I don’t want you to say things that may ultimately be recorded.”²

² The court’s concern appears to have been based on Balvaneda’s behavior in court. The court had to admonish Balvaneda to “calm down” at one point and later mouthed “[s]top” to him as he apparently was objecting to testimony of the prosecution’s traffic collision expert. The court told Balvaneda, “[y]ou have been animated throughout this process” and “with your attorney.” Balvaneda responded, “I am bothered that they lied.” The court reminded Balvaneda to “be professional” and to write notes to his attorney if necessary. The court explained that, with Balvaneda acting out, “the jury has been taking notice[,] in my view[,] which actually may hurt you rather than help you.” The court continued, “[Y]ou are making it difficult[,] in my judgment[,] for your lawyer to focus on the evidence when you are frequently, essentially ha[r]ping in his ear.”

Defense counsel then mentioned a concern about a conversation in Spanish.³ The court told Balvaneda, “You, first of all, don’t have to make the decision right now. You can make the decision any time up to the point where the trial is over[,] where your counsel says, ‘[w]e rest.’ Do you understand that?” Balvaneda answered, “All right.” The court continued, “You will need to make sure right before your counsel says[, ‘]we are going to rest,[’] you need to make sure you communicated with him, that you do or don’t want to testify. Does that make sense to you?” Balvaneda answered, “Yes, that is fine.”

The court asked Balvaneda, “Will you agree that if you believe that anyone is coercing or pressuring you in any way, including your lawyer, either to testify or not to testify[,] and you feel pressured or coerced, that you will let me know that[?] Will you agree to do that?” The court told defense counsel it wanted to make sure none of them (possibly referring to Balvaneda’s family members) “are in any way [detracting] from what I [am] trying to accomplish here.” Counsel responded, “They are not. He just again asked me. It is his decision and he has to make that decision and he will do so. The court is telling him that it is his decision.” The court addressed Balvaneda, “You do understand? Is that correct? If so, say[, ‘]yes.[’] Do you understand this is your decision alone?” Balvaneda answered, “Yes, of course.” The court said, “Would you agree to that?” Balvaneda said, “Yes, of course.” The court continued, “You need to do that before your side rests. Do you understand that?” Balvaneda responded, “Yes. Perfect.”

The court told Balvaneda, “If you don’t tell me that [you] and your counsel rest[] or I see you are taking the stand, I will

³ Balvaneda was assisted throughout the proceedings by a court-certified Spanish language interpreter.

assume this is your decision alone [and] no one has coerced you in any shape or fashion. Is that a fair way to proceed, sir?" Balvaneda answered, "Yes." Defense counsel told the court he would like just to confirm with his client, before resting, that he did not wish to testify. The court told counsel to let the court know if he needed a moment when they got to that point in the trial.

Later, during another break in the defense case, defense counsel said he planned to rest shortly. The court inquired, "Mr. Balvaneda, at this point[,] doesn't anticipate testifying?" Counsel responded, "At this point in time he's told me[, 'no.[]'" The court asked Balvadena, "Is that correct, Mr. Balvadena?" Balvadena answered, "Yes."

Two days later, at the conclusion of the defense case, outside the jury's presence, the trial court inquired: "Mr. Balvaneda does not intend to testify?" Defense counsel answered, "He does not intend to testify at this point in time." The court stated, "And the record will reflect I gave five minutes. They have had more than 20 minutes [apparently referring to defense counsel's conference with his client], and I also asked Mr. Balvaneda to consider this and he has had a long time to consider what he is doing. Am I correct, you don't intend to testify, yes or no?" Balvaneda answered, "No."

The prosecution called several rebuttal witnesses. When the prosecution again rested, outside the jury's presence, defense counsel told the court, "After careful consideration[,] and I know the court has seen the lively exchange between me and my client. I am making a strategic move not to call any other witnesses. The purview is all mine, no one else, although my client is insisting, as a strateg[ic] move, I will not call him." The court responded,

“I do understand that. I will note for the record, this is just an observation. I really do not want a response from you, Mr. Balvaneda. But I have noticed throughout this trial more than lively communication coming from the defendant than I have seen in probably any other case. Certainly it is ranked among the highest I have seen. Throughout the trial[,] as counsel has been attempting to focus on the evidence, Mr. Balvaneda seems to be very animated and repeatedly asking questions orally and in writing. I have been looking at [defense counsel]. At times he has been trying to be able to handle both the constant questioning from his . . . client as well as dealing with the matters that have been going on in trial. So that has been my observation, and it has been fairly constant throughout this process. I don’t want you responding, Mr. Balvaneda. You continue to want to interject in every way throughout this process. . . . That is your right to speak with him and do that. I explained to you it makes it difficult for him. I know if I were in his shoes, if I was trying to concentrate on the evidence, it would be very difficult. If you are trying to listen, trials are not easy. You are trying to listen to what is happening. You know what you have to do next. You know to remember that to come back to it, to bring on a different point and to respond to that point. There is a lot that goes on in a trial. It is not easy for lawyers to do.

They have a lot they are juggling. When you have someone constantly in your ear or in your face, it becomes difficult and he has training but it is not only [to] use the training but also to make strategic decisions and do it quickly. It is obvious[] he has been struggling throughout this process.”

The court asked defense counsel, “Am I misstating these things?” Counsel said, “No.” The court then brought in the jurors.

4. *The verdicts and sentence*

On July 11, 2017, the jury informed the trial court that it was deadlocked on the second count of assault with a deadly weapon. The court took the verdict on the first count, on which the jurors had reached a unanimous decision: guilty. On July 27, 2017, the People moved to dismiss the second count and the court granted that motion. The court sentenced Balvaneda to the midterm of three years in the state prison.

DISCUSSION

Balvaneda contends “the record is clear that [he] wanted to exercise his Fifth Amendment constitutional right to testify and was denied.” He asserts, “The trial court refused to permit [him] to testify.” With no citation to the record, Balvaneda argues his counsel “failed to have any meaningful discussion with [him] either before or during the trial over [*sic*] his fundamental right to testify,” that he “desired to testify,” and that he “would have offered significant testimony that would have undermined the prosecution’s case against him.” Neither the record in this case nor the governing law supports Balvaneda’s contentions.

“A defendant in a criminal case has the right to testify in his or her own behalf.” (*People v. Bradford* (1997) 15 Cal.4th 1229, 1332; see also *People v. Robles* (1970) 2 Cal.3d 205, 215.) “The defendant may exercise the right to testify over the

objection of, and contrary to the advice of, defense counsel.”
(*Bradford*, at p. 1332.)

A trial court is not required to “obtain an affirmative waiver on the record whenever a defendant fails to testify at trial.” (*People v. Alcala* (1992) 4 Cal.4th 742, 805 (*Alcala*).) “The waiver of the right to testify may be made by counsel, and the courts have wisely refused to impose a sua sponte obligation on the trial court to extract a personal waiver from the defendant.” (*People v. Hayes* (1991) 229 Cal.App.3d 1226, 1232 (*Hayes*).) “ ‘ “[A] trial judge may safely assume that a defendant, who is ably represented and who does not testify[,] is merely exercising his Fifth Amendment privilege against self-incrimination and is abiding by his counsel’s trial strategy” ’ ” (*Alcala*, at p. 805. See also *People v. Mosqueda* (1970) 5 Cal.App.3d 540, 545; *People v. Bradford* (1997) 14 Cal.4th 1005, 1052-1053 [trial court has no sua sponte duty to inform a defendant “of his right to testify and to obtain an express personal waiver of that right”].) “ ‘ When the record fails to disclose a timely and adequate demand to testify, “a defendant may not await the outcome of the trial and then seek reversal based on his claim that despite expressing to counsel his desire to testify, he was deprived of that opportunity.” ’ ” (*Bradford*, at p. 1053; accord *Hayes*, at pp. 1231-1232.)

Here, even though the trial court had no obligation to do so, it explained to Balvaneda at great length his rights to testify or not to testify and, instead, to remain silent. The court emphasized the decision ultimately was Balvaneda’s alone, and it secured a promise from Balvaneda to tell the court if anyone—including his attorney—was pressuring him one way or the other.

Balvaneda does not acknowledge this lengthy and thorough exchange between the trial court and himself. Instead, he asserts

(1) he *did* tell the court he wanted to testify but the court ignored his request, and (2) his lawyer later told the court he was not calling Balvaneda as a witness even though Balvaneda was “insisting.”

On the first point, as noted, just before the defense rested the court again asked if Balvaneda intended to testify. Defense counsel responded, “He does not intend to testify at this point in time.” The court then said to Balvaneda, “Am I correct, you don’t intend to testify, yes or no?” Balvaneda answered, “No.” The court then said, “Let’s bring in the jury.”

Plainly, the court understood both Balvaneda’s lawyer and Balvaneda himself to be confirming he did *not* intend to testify. Granted, the court’s question is phrased somewhat as a double negative. Balvaneda now asks us to consider only the first question (“[a]m I correct?”) and to ignore the second question (asking for a yes or no answer to the question of whether Balvaneda planned to testify). But the reasonable, common sense interpretation of the exchange—in light of all of the surrounding circumstances—is that Balvaneda affirmed what his lawyer had just told the court: he did not intend to testify. Had anyone understood Balvaneda to be telling the judge, “[n]o, you are *not* correct,” there would have been further discussion. The court had explained to Balvaneda at length his absolute right to testify. His attorney had just reaffirmed, again, that he chose not to testify. Balvaneda never said anything to suggest his lawyer or the judge had misunderstood him or that he wanted to testify.

Nor does the later exchange, after the prosecution completed its rebuttal case, persuade us that the trial court refused a “timely and adequate[] assert[ion]” by Balvaneda of his right to testify. (*Hayes, supra*, 229 Cal.App.3d at p. 1231.) When the prosecutor told the court she had no more witnesses, the court asked defense counsel, “[A]ny surrebutt[al]?” Defense

counsel responded, “I have additional surrebuttal. I need to discuss with my client for a moment.” Counsel added, “I would like a moment if I may, five minutes at the most[,] just to see whether I want to call anybody.” The court granted that request.

After the recess, defense counsel referred to his just-concluded “lively exchange” with his client. He told the court, “I am making a strategic move not to call any other witnesses. The purview is all mine, no one else, although my client is insisting, as a strateg[ic] move, I will not call him.” On the proverbial “cold record” it is unclear exactly what defense counsel meant. His reference to “witnesses” may have encompassed both Balvaneda and other witnesses. In any event, Balvaneda never—neither then nor at any other time during the trial—told the judge he wanted to testify and his lawyer would not let him. Again, the court not only explained to Balvaneda, in great detail, that the decision was his; it asked for and received a promise from Balvaneda that if anyone interfered with his exercise of that right, he would tell the judge. He never did so.

A criminal defendant’s “right to testify over his attorney’s objection . . . is subject to one significant condition: The defendant must timely and adequately assert his right to testify.” (*Hayes, supra*, 229 Cal.App.3d at pp. 1231-1232 & fn. 9 [defendant’s “assert[ion] . . . that he wanted ‘to speak on [his own] behalf’ ” did “not reflect a clear and timely assertion of his desire to take the witness stand”; defendant’s “numerous comments during the proceedings” and “interruptions during the victim’s testimony . . . interjecting claims the testimony was biased or untrustworthy” did not constitute “clear[] assert[ion] [of] desire to testify”]; see also *Alcala, supra*, 4 Cal.4th at p. 805 [defendant did not “inform the court, prior to the conclusion of the . . . trial, that he sought the opportunity to testify on his own behalf”].)

In sum, the trial court here did not preclude Balvaneda from testifying.

DISPOSITION

We affirm Julio Balvaneda's conviction.

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EGERTON, J.

We concur:

EDMON, P. J.

LAVIN, J.