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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. SHANE FAR NEWMAN, Defendant and Appellant.	B238517 (Los Angeles County Super. Ct. No. SA068584)

APPEAL from a judgment of the Superior Court of Los Angeles County, Antonio Barreto, Jr., Judge. Affirmed.

Syda Kosofsky, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant and appellant Shane Far Newman guilty of two counts of assault with a firearm. He contends on appeal that his federal due process rights were violated by the admission of allegedly irrelevant evidence. He also contends that he received ineffective assistance of counsel and that the trial court abused its discretion by denying him probation. We reject all contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

A. *The personal and business history between defendant and the victims*.

In 1979, Emanuel Sabet (Emanuel) and his wife, Gila Sabet (Gila),[1] immigrated to the United States from Iran. In 1987 or 1988, defendant, Emanuel's cousin, also emigrated from Iran. At that time, Emanuel owned a consumer financing business that provided and serviced small loans to homeowners. Emanuel's friends and family members, including defendant, invested in the business. Defendant invested about $300,000, including investments in real property.

At first, the business was successful. In 1991, however, it, along with the economy, collapsed. Emanuel "lost everything," including his and his parents' investments and his house. Many others also lost money as a result of the failure of Emanuel's business, including defendant, and they were angry at Emanuel. In connection with one of the properties defendant invested in, he sued Emanuel and received a $30,000 settlement. But Emanuel declared bankruptcy in 1992 and his debts were discharged. Defendant threatened to kill Emanuel and to throw acid on his children's faces. Defendant said he would never let Emanuel's children get married. Emanuel reported these threats and, in 1991, obtained a restraining order against defendant.[2] Even after the restraining order, defendant threatened Emanuel, once at a Denny's restaurant in 1992 and another time at Emanuel's brother's house.

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[1] Because some parties share a surname, we use first names.

[2] Emanuel agreed to a mutual restraining order.

Based on defendant's claim that Emanuel stole a check from him, criminal charges were filed against Emanuel in 1992. After a preliminary hearing at which defendant and Emanuel testified, Emanuel was not held to answer and the charges were dismissed. Based on a similar claim made by defendant, criminal charges were again filed against Emanuel in 1993. After a preliminary hearing at which defendant testified, the charges were again dismissed.

The next contact Emanuel had with defendant was at a family wedding, where defendant threw a glass of water or wine in Emanuel's face and called him a thief. Then, in 1997, a flyer was distributed at Persian markets on Pico and on Santa Monica and at Emanuel's apartment building stating that Emanuel owed $800,000 but wouldn't pay. Emanuel filed a slander suit against various individuals, although not against defendant, in connection with the fliers.

B. *The assaults on August 7, 2008.*

In 2008, Emanuel's and Gila's daughter, Sharon, became engaged to Farbod "Fred" Monempour (Fred). Anonymous letters were sent to the Monempours trying to dissuade Fred from marrying Sharon and accusing Emanuel of swindling people. When Emanuel's niece got married a year before, similar letters had been sent to her future husband.

Gila and a friend were walking in Gila's neighborhood on August 5, 2008 when she saw defendant drive by. Emanuel also saw defendant stop in front of his and Gila's building and wait there. Concerned because he hadn't seen defendant in about 10 years, Emanuel wrote down the license plate number of the car defendant was driving and reported the incident to the police.

Two days later, on August 7, 2008, Emanuel, Gila, and Sharon had dinner at the Monempours' home in West Los Angeles to discuss the upcoming wedding. Between 8:00 and 8:30 p.m., Danny Monempour (Danny) and his wife dropped off their baby for his parents to watch. When he dropped off the baby, Danny noticed defendant sitting in a car in front of the house. When Danny returned a couple of hours later, defendant was still there.

Sometime after 11:30 p.m., Emanuel and Gila left the Monempours' home. Gila was getting into the car when she heard someone running towards her. Turning, she saw defendant pointing a gun at her. As she took cover behind the car door she heard a gunshot. Gila ran around the car to a tree, where she tried to hide. She heard another gunshot and defendant say, " 'I'm going to kill you, I'm going to kill you.' " Defendant put his hand around the tree and fired the gun again. Emanuel ran to the back of the car, and he saw defendant aim the gun at him. Defendant wore latex gloves.[3]

Sharon, who had remained in the house, opened the front door after hearing her mother scream and a gunshot. Fred saw defendant shooting a gun in Emanuel's and Gila's direction. Sharon ran down the front steps to defendant, who was chasing her father, and tackled defendant, knocking him down. She sat on defendant's back and held down the hand holding the gun, but defendant fired another shot. Emanuel ran to them and held down defendant's hand. By slamming defendant's hand to the ground a few times, Emanuel got him to release the gun. Because defendant was still struggling, Emanuel hit him over the head with the butt of the gun. Emanuel put the gun down, and Gila kicked it away.

Fred tried to go outside to help Sharon, but his father restrained him. When Fred broke free, defendant was already on the ground, held down by Emanuel and Sharon. Fred kicked defendant multiple times.

Casings and a spent round were found at the scene. A gun case and a box of live ammunition were in defendant's car, which was parked at the scene. The parties stipulated that defendant bought the gun used in the shooting. Just days before the shooting, defendant, on August 2, 2008, went to a shooting range.

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[3] According to Sharon, defendant wore a latex glove on the hand holding the gun. According to Fred and his father, defendant wore latex gloves on both hands. The gloves were not booked into evidence.

C. *The defense theory of the case.*

The defense theory of the case was that the Sabets set up defendant up. Character witnesses testified that defendant was a gentle, nonviolent person who could not have committed the crimes.

II. Procedural background.

An information filed in April 2009 charged defendant with two counts of premeditated attempted murder. A jury deadlocked on those charges, and the trial court declared a mistrial on April 16, 2010. An amended information added two counts for assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b)).[4] On December 1, 2011, a jury found defendant guilty of those counts 3 (Emanuel) and 4 (Gila), assault with a semiautomatic firearm. As to both counts, the jury found true a personal gun use allegation (§ 12022.5, subd. (a)). The jury deadlocked on counts 1 and 2 for attempted murder, and the court therefore declared a mistrial as to those counts.

The trial court denied defendant's request for probation and, on January 12, 2012, sentenced him, on count 3, to six years plus four years for the gun use enhancement, and on count 4, to a consecutive two years plus 16 months for the gun use enhancement, for a total sentence of 13 years 4 months.

DISCUSSION

I. Admission of the prior criminal proceedings did not violate defendant's federal due process rights.

In the early 1990's, defendant reported to the police that Emanuel had forged a check. Based on that report, criminal charges were filed against Emanuel, but they were dismissed after a preliminary hearing. Defendant contends that this evidence was irrelevant and that its admission violated his federal due process rights. We disagree.

Only relevant evidence is admissible. (Evid. Code, § 350.) Evidence is relevant if it has a "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action," such as identity, intent or motive. (Evid. Code, § 210;

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[4] All further undesignated statutory references are to the Penal Code.

see also *People v. Lee* (2011) 51 Cal.4th 620, 642-643; *People v. Cowan* (2010) 50 Cal.4th 401, 482.) The abuse of discretion standard of review applies to a trial court's ruling on the admissibility of evidence, including a ruling concerning relevance. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.) A trial court therefore has broad discretion in determining the relevance of evidence but lacks discretion to admit irrelevant evidence. (*Cowan*, at p. 482.)

Evidence of the prior criminal proceedings was relevant. A dominant part of both the prosecution and defense cases was the long, complicated personal and professional history between the parties. They were first cousins. They were business partners. And they were adversaries. Although the criminal proceedings occurred approximately 15 years before defendant's assaults on Emanuel and Gila, they were a part of this history demonstrating animosity between the parties. That defendant instigated the criminal proceedings against Emanuel thus tended to establish a motive for the current crimes against Emanuel. As the trial court noted, "it might be even more reason for the defendant to be upset because [Emanuel] got away with, you know, the crime that he committed or something . . . ."

Even defendant's trial counsel had no objection to evidence of the prior criminal proceedings against Emanuel. Defense counsel could have believed that the evidence cut both ways: it showed that defendant hated Emanuel, but it also tended to show that Emanuel had a history of defrauding people and of lying, which was a dominant theme of the defense case. Because there was a clear tactical reason for defense counsel's decision not to object to this evidence, defendant's additional argument that counsel provided ineffective assistance based on a failure to object fails. " ' "Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " [Citations.]' " (*People v. Jones* (2003) 29 Cal.4th 1229, 1254.)

And to the extent defendant contends that the evidence gave an improper impression that defendant brought false criminal charges against Emanuel, the trial court,

aware of the potential for prejudice, ruled that only the basic facts concerning those proceedings were admissible and that any findings the judge made at the preliminary hearing were not admissible. The court said: "Going forward, the prior criminal case that took place in Beverly Hills where [Emanuel] was the defendant and the [defendant] was the principal witness, the fact that that occurred, the fact that [defendant] made the crime report, . . . the fact that [Emanuel] was the defendant in that matter, all of that is admissible just to show that it occurred. [¶] The fact of how it concluded, that [Emanuel] was not held to answer is also admissible, but any comments made by Judge Fox or any findings made by him are not admissible in this matter because those statements that were made are not going to be repeated to this jury because of the nature of the weight that may be afforded to them. Number one, that it may be considered by the jury as a finding that the defendant was lying in that case; or number two, that it may be considered by the jury as a finding that [Emanuel] was factually innocent of that case. Neither of those things is necessarily borne out by the result of that case, but the fact that the case occurred, again, is part of the history between these two people and I will not relitigate that matter, we will not go into the facts of that case and have a trial within a trial regarding that one, but the fact that it occurred, the fact there was a filing, the fact there was a preliminary hearing and the fact that the man wasn't held to answer, that is admissible and that is it. I will not judicially notice any other part of that case, so that evidence is limited by way of its admissibility." The court later reiterated that counsel would not be allowed to address why the preliminary hearing judge dismissed the charges; the only relevant fact was Emanuel was not held to answer.

The trial court ensured that the parties followed this limiting order. When, for example, the prosecutor stated in opening argument that after the preliminary hearing in the prior criminal proceedings was held, "the criminal justice system did its thing, and at the end of the day, [Emanuel] was exonerated for any criminal wrongdoing in which the defendant was the complaining witness," the trial court interjected that " 'exonerated' " was the "wrong word." The court explained: "There is a technical finding that is done at the end of a felony preliminary hearing. Either a person is bound over for trial or they are

not held to answer. So what the fair conclusion or the statement that can be made was that the person was not bound over for trial, was not held to answer."

Similarly, when Emanuel testified that defendant "falsely alleged that I stole a check from him" the trial court explained again what is a preliminary hearing. The court said: "Now, members of the jury, we are not here to try and figure out what the evidence was at that proceeding or why the magistrates ruled as they did or as the magistrate did, merely that a case was filed, it was before a judicial officer in Beverly Hills, and on September 8th, 1992, this gentleman who is the witness who was the defendant there, was not held to answer, that's it. That's what the court judicially notices along with the court's explanation of what a preliminary hearing is."

Thus, not only did the trial court act well within its discretion by admitting evidence of a relevant event in the history between defendant and Emanuel, the court carefully limited the evidence to the facts that charges were brought and dismissed. We therefore also reject defendant's related argument that admitting the evidence violated his federal due process rights. "Ordinarily a criminal defendant's attempt 'to inflate garden-variety evidentiary questions into constitutional ones [will prove] unpersuasive." (*People v. Thornton* (2007) 41 Cal.4th 391, 443-444.) Even where a trial court renders an erroneous evidentiary ruling, a defendant's due process rights are usually not violated. (*Montana v. Egelhoff* (1996) 518 U.S. 37, 52-53 [such due process claims, usually citing *Chambers v. Mississippi* (1973) 410 U.S. 284, are often overbroad, as *Chambers* was a fact intensive, specific case]; *People v. Falsetta* (1999) 21 Cal.4th 903, 913.)

II. Defendant's trial counsel did not render ineffective assistance.

Defendant next contends that his trial counsel rendered ineffective assistance by failing to object to two instances of alleged prosecutorial misconduct. We conclude that no prejudicial prosecutorial misconduct occurred, and therefore defendant's trial counsel did not provide ineffective assistance by failing to object.

"The applicable federal and state standards regarding prosecutorial misconduct are well established. ' "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial

with such unfairness as to make the conviction a denial of due process.' " ' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Misconduct that infringes upon a defendant's constitutional rights mandates reversal of the conviction unless the reviewing court determines beyond a reasonable doubt that it did not affect the jury's verdict. (*Chapman v. California* (1967) 386 U.S. 18.) A violation of state law only is cause for reversal when it is reasonably probable that a result more favorable to the defendant would have occurred had the district attorney refrained from the untoward comment. (*People v. Watson* (1956) 46 Cal.2d 818.)

Here, defendant raises two alleged instances of prosecutorial misconduct: first, the prosecutor misstated the burden of proof when discussing an "abiding conviction," and, second, she referred to facts not in evidence by implying that defendant distributed the anonymous flyers and letters maligning Emanuel.

First, in rebuttal to defense counsel's argument that an "abiding conviction" of guilt is a belief that the "charges are true today, you believe they're true 5 years from now, 10 years from now, 20 years from now," the prosecutor argued: "This is [a] willful, deliberate, premeditated, attempted murder. Based upon not what I'm telling you, based upon what the witnesses said to you. Reasonable doubt is not any possible doubt. Reasonable doubt is not a standard that you have to consider when you say, oh, if I convict this person I have to live with this. Counsel said it's a decision you have to live with. Look at the reasonable doubt instruction. It will tell you. Abiding conviction. You decide what abiding conviction is. It doesn't say anything about five years from now you're sure, or two years from now you're sure, or anything like that. It's very clear in the jury instructions, and it's the same instruction that is used in a DUI case, in a petty theft case. Because this is a serious crime the standard is no different, and I would ask you not to be intimidated by that standard."

Defendant here makes an argument similar to that made in *People v. Pierce* (2009) 172 Cal.App.4th 567; namely, it was misconduct for the prosecutor to suggest that " 'an abiding conviction' " does not require a certain permanence. In *Pierce*, the defense counsel told the jury that an abiding conviction is a " 'permanent sort of a belief.' " (*Id.* at p. 570.) The prosecutor then told the jury that the instruction, CALCRIM No. 220, says nothing about " 'tomorrow, next week, next hour, you know, when you're deliberating, when you've made your decision, that's when it counts. There's no legal requirement of and we'll come back in a week and make sure you're all good with this.' " (*Pierce*, at pp. 570-571.) *Pierce* concluded that there was no reasonable likelihood the prosecutor's "brief remarks led the jury to think that 'an abiding conviction' of the truth of the charge was something less than the self-evident nature of 'abiding' as 'settled and fixed' and 'lasting [and] permanent.' " (*Id.* at pp. 573-574.)

We similarly conclude there was no reasonable likelihood the jury here was misled as to any requirement of permanency as it relates to an abiding conviction. (*People v. Brigham* (1979) 25 Cal.3d 283, 290 [an abiding conviction is one of a lasting, permanent nature; but see *id.* at pp. 299-300 [emphasizing that the duration of a jury's belief is "confusing and misdirected" and is irrelevant] (conc. opn. of Mosk, J.).) The prosecutor merely pointed out that CALCRIM No. 220 says nothing about the duration of the jury's belief. That instruction, which defendant does not challenge, correctly told the jury: " 'Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.' " (CALCRIM No. 220.) Nor do we think that the prosecutor's statement, "You decide what abiding conviction is," told the jury to ignore the instructions. Placed in context, it appears that the prosecutor was telling the jury it had before it defense counsel's statement about abiding conviction and the instruction's statement on reasonable doubt. Between these two statements, the jury had to "decide what abiding conviction is." In any event, there is no reasonable likelihood the jury misconstrued the burden of proof.

Second, defendant argues that the prosecutor referred to facts not in evidence when she said: "Twenty years ago when the defendant lost money what did he do? How's he going to get back at Mr. Sabet who he thinks wronged him? He tries civil proceedings. That sort of works. He gets some money. He tries humiliation. Shunning in the community. The flyers that were disseminated. The phone calls. The letters. The hateful letters to anybody who had to do with Mr. Sabet."

A prosecutor commits misconduct where he or she misstates or mischaracterizes the evidence or asserts facts not in evidence. (*People v. Davis* (2005) 36 Cal.4th 510, 550; *People v. Hill* (1998) 17 Cal.4th 800, 827-828 [vigorous presentation of facts does not excuse deliberate or mistaken misstatements of fact].) The prosecutor here, however, did not misstate the evidence. As to the letters, Emanuel testified that defendant was "the head of the, you know, or did all the pushing of these letters. I believe that he used some help from some other relatives to write it." Emanuel also testified that although he didn't think defendant sent the letters to Fred "himself, but I think that he did it with a group, with assistance of some other people." The prosecutor's implication that defendant was involved in or responsible for the letters was therefore based on the evidence.

As to the fliers that were distributed in the community, defendant is correct that no witness directly connected defendant to their distribution. But a prosecutor is given wide latitude during closing argument to make fair comment on the evidence, including reasonable inferences or deductions to be drawn from it. (*People v. Collins* (2010) 49 Cal.4th 175, 213.) Given the long history between the parties, it was reasonable for the prosecutor to infer that defendant was involved in the fliers.

Because we conclude that no prosecutorial misconduct occurred, defendant's claim that his trial counsel rendered ineffective assistance by failing to object to these statements fails. "A meritorious claim of constitutionally ineffective assistance must establish both: '(1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing on either one of these

components, the ineffective assistance claim fails.' " (*People v. Holt* (1997) 15 Cal.4th 619, 703; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Lopez* (2008) 42 Cal.4th 960, 966.) Trial counsel's representation did not fall below an objective standard of reasonableness because, as we have said, the prosecutor's statements about reasonable doubt and the fliers and letters were not objectionable.

III. The trial court did not abuse its discretion by denying probation.

Defendant contends that the trial court abused its discretion by denying him probation based on his age and failure to admit guilt. We disagree.

Defendant was presumptively ineligible for probation, unless his was an "unusual case": "Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted" to "[a]ny person who used, or attempted to use, a deadly weapon upon a human being in connection with the perpetration of the crime of which he or she has been convicted." (§ 1203, subd. (e)(2); see generally *People v. Stuart* (2007) 156 Cal.App.4th 165, 177.) Rule 4.413(c) of the California Rules of Court lists factors that "may indicate the existence of an unusual case" to overcome the statutory presumption against probation. They include facts limiting defendant's culpability, such as whether the defendant is youthful or aged and has no significant record of prior criminal offenses. (Cal. Rules of Court, rule 4.413(c)(2)(C).) "Under rule 4.413, the existence of any of the listed facts does not necessarily establish an unusual case; rather, those facts merely '*may* indicate the existence of an unusual case.' [Citation.]" (*Stuart*, at p. 178.) If a trial court determines that the presumption against probation has been overcome, then the court evaluates whether to grant probation under California Rules of Court, rule 4.414, which lists criteria affecting that decision. (*Stuart*, at p. 178; *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 830.)

A trial court's finding that a case may or may not be unusual is reviewed for an abuse of discretion. (*People v. Stuart, supra*, 156 Cal.App.4th at p. 178.) Similarly, whether to deny or grant probation generally rests within the trial court's broad discretion, and its decision will not be disturbed on appeal absent a showing that the court

exercised its discretion in an arbitrary or capricious manner. (*People v. Downey* (2000) 82 Cal.App.4th 899, 909.) A court abuses its discretion when its decision " 'exceeds the bounds of reason, all of the circumstances being considered.' [Citation.] We will not interfere with the trial court's exercise of discretion 'when it has considered all facts bearing on the offense and the defendant to be sentenced.' [Citation.]" (*Id.* at pp. 909-910; see also *Stuart*, at p. 179; *People v. Superior Court (Du), supra,* 5 Cal.App.4th at p. 831; *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) " '[I]f the statutory limitations on probation are to have any substantial scope and effect, "unusual cases" and "interests of justice" must be narrowly construed,' and rule 4.413 is 'limited to those matters in which the crime is either atypical or the offender's moral blameworthiness is reduced.' " (*Stuart*, at p. 178.) We presume the trial court acted to achieve legitimate sentencing objectives in the absence of a clear showing the sentencing decision was irrational or arbitrary. *(People v. Carmony* (2004) 33 Cal.4th 367, 376-377.)

The trial court's decision here was neither irrational nor arbitrary. As to defendant's claim that the trial court did not consider his age, 73 at the time of sentencing, that is inaccurate. After hearing from defendant's friends and family and from defendant, the trial court gave a lengthy and thoughtful statement, saying this about defendant's age: "Well, the defendant was not a young man when he committed the crime. So, therefore, it's not a situation where in terms of assessing punishment he has now become aged. . . . That might be a reason to consider the age. But in this situation the defendant was not a young man in 2008, and his health wasn't great then either. [¶] So there's really one factor in this matter that comes within that heading of an unusual circumstance, and that is the fact that the defendant had no prior criminal record of any kind. That's basically it. That standing alone is not sufficient, as a matter of law, to constitute an unusual case because the interests of justice don't dictate that. If that were so, then anyone with [no] prior record would automatically get probation as long as they could be otherwise eligible for probation regardless of their conduct. And that, of course, would be a silly way to apply the law. [¶] So the court does not find this is an unusual case. And, therefore, the defendant is not eligible for probation . . . ." The court thus

noted that defendant's age and health had not prohibited him from committing the crime and therefore the court didn't consider it an "unusual circumstance" to justify probation.

Next, defendant suggests that the trial court based its probation decision on defendant's failure to testify, in violation of his Fifth Amendment rights. That is incorrect. The court merely commented that the verdicts were based on the evidence the jury heard. Although defendant gave a statement to the court at the sentencing hearing providing an innocent explanation for what happened the day of the shooting, "the jury heard none of that because the defendant did not testify in this case." The court was not commenting on defendant's Fifth Amendment right; the court was merely commenting on the state of the evidence before the jury.

Finally, defendant contends that the trial court improperly conflated lack of remorse with defendant's claim of innocence when it denied probation. (See *People v. Key* (1984) 153 Cal.App.3d 888, 900-901 [in a case where the defendant acknowledges guilt but shows no remorse, a sentence may be aggravated, as opposed to a case where the defendant denies guilt].) California Rules of Court, rule 4.414(b)(7) provides that whether the defendant is remorseful can be a factor in the decision to grant or to deny probation. (Cal. Rules of Court, rule 4.414(b)(7).) The trial court said, "I don't think the defendant is remorseful in any way, so that one doesn't count." In making this statement, the trial court did not link its finding to defendant's claim of innocence. There is no support, therefore, for defendant's conclusion that the court denied probation because he maintained his innocence.

The trial court acted well within its discretion to deny probation.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.