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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

VIRIDIANA HERNANDEZ,

Defendant and Appellant.

B278162

(Los Angeles County
Super. Ct. No. TA140586)

APPEAL from a judgment of the Superior Court of Los Angeles County, John J. Lonergan, Judge. Affirmed.

Richard L. Fitzer, 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, Shawn McGahey Webb and Nicholas J. Webster, Deputy Attorneys General, for Plaintiff and Respondent.

Viridiana Hernandez appeals from her judgment of conviction of second-degree burglary, arguing the trial court violated her due process rights by misadvising her regarding the financial consequences of a proffered plea deal. We disagree and affirm.¹

FACTUAL AND PROCEDURAL SUMMARY

In August 2016, appellant was charged by information with second-degree robbery (Pen. Code, § 211).² The information alleged the offense was a serious felony. (§ 1192.7, subd. (c).) It further alleged appellant had served a prison term for a prior offense as described in section 667.5, subdivision (b).

At a September 2016 pretrial conference, the prosecutor offered appellant a two-year sentence in exchange for a guilty plea. The offer was rejected. On September 28, 2016, appellant again rejected the two-year offer and the case was called for jury trial.

During its deliberations, the jury announced that it was deadlocked. The jury was polled and the split was 11 to 1. The court read CALCRIM No. 3551, which discusses difficulty reaching a verdict, and directed the jury to continue deliberations. During the period when the jury was deadlocked,

¹ In case No. B282639, Hernandez filed a companion petition for writ of habeas corpus based on ineffective assistance of counsel. By order dated May 25, 2017, we indicated that the petition would be considered together with this appeal. The petition has been considered and is denied by separate order filed this date.

² Subsequent undesignated statutory references are to the Penal Code.

the prosecutor offered appellant a plea bargain of time served in exchange for a guilty plea for attempted robbery. The court then made the following statement:

“Okay. Ms. Hernandez, because the original offer included state prison, I believe in this case prior to the trial you were offered a mid term two-year state prison sentence if you pled on the one count here. The court did not inform you of the defense recovery cost rates that could be charged against you. You’d have a right to a hearing to see—to state your ability to pay or not pay, but this was a felony trial. It falls under . . . category five so the attorney costs, the defense recovery costs are in an amount you could be charged up to \$10,175. That is for the service of your attorney who is paid by the state.

“So I need to make you aware of that and I’m doing it now because the People have given you a credit time-served offer. I don’t do it when it’s a state prison offer because I do not want that impacting your discussion with your attorney and influencing you on whether or not to take an offer because you could be charged this amount of money when it involves state prison.

“I’m bringing it up now because I’m obligated to regardless of what the offer was, but personally I only do this when it’s a credit time-served offer in order not to put any pressure on you to take something other than a credit time-served offer.

“So consider this notice that the court will conduct a hearing and determine whether or not I’m going to charge you up to \$10,000, \$10,175 for the recovery of your defense attorney’s work on this case. Okay?”

Appellant responded, “Okay.” The prosecutor’s offer was neither accepted nor rejected. The following day, the jury indicated it had reached a verdict. The court asked, “Is there anything for the record from either side before I bring out the jury and the court takes the verdict?” Both sides responded, “No.”

The jury returned a verdict finding appellant guilty of second-degree robbery. The court sentenced her to the low term of two years in state prison. (§ 213, subd. (a)(2).) According to appellant’s opening brief, the allegation regarding appellant’s prior conviction was stricken by a nunc pro tunc order in the Superior Court on February 15, 2017. Appellant received 99 days of credit for actual time served and 99 days of conduct credit, totaling 198 days.

This appeal followed.

DISCUSSION

Appellant argues the trial court violated her due process rights by its statement regarding the financial consequences of accepting the midtrial plea offer. We disagree.

When a trial court misinforms a defendant about the consequences of a plea bargain, causing her to reject an offer she otherwise would accept, the defendant’s due process rights have been violated. (*People v. Goodwillie* (2007) 147 Cal.App.4th 695, 733-735 (*Goodwillie*).)

Appellant relies on *Goodwillie*, in which the trial court’s misstatement of the defendant’s eligibility for custody credits dissuaded him from accepting a favorable plea bargain. (*Goodwillie, supra*, 147 Cal.App.4th at pp. 731-734.) The defendant indicated on the record that he would have been

willing to accept the offer had he been correctly advised of his eligibility for custody credits. (*Id.* at p. 736.) The appellate court reversed his conviction, finding that the misstatement by the trial court caused the defendant to reject the deal and thereby violated his due process rights. (*Id.* at pp. 733-735.)

This case is distinguishable from *Goodwillie*. Here, the trial court did not misinform appellant as to the financial consequences of accepting the plea offer. The court accurately stated that a hearing would be held regarding appellant's ability to pay and that she could be required to pay her attorney fees under section 987.8, subdivision (b). Thus, we find no due process violation.

We also find that appellant has not satisfied her burden to show prejudice resulting from the trial court's statement. Most courts have held that reversal is required only where there is evidence that the defendant would have accepted the offer but for the misinformation. (*People v. Miralrio* (2008) 167 Cal.App.4th 448, 463 (*Miralrio*) [burden is on appellant to show that plea decision was influenced by court's error]; see also *In re Moser* (1993) 6 Cal.4th 342, 352 [appellant must demonstrate prejudice]; and *People v. Archer* (2014) 230 Cal.App.4th 693, 705-706; but see *Goodwillie, supra*, 147 Cal.App.4th at p. 736 [burden is on prosecution to show lack of prejudice beyond a reasonable doubt].) We are persuaded by the reasoning in *Miralrio*. That case held that the burden is on the appellant, who is in a better position to know whether or not he or she was prejudiced. (*Miralrio, supra*, at p. 463.)

Unlike the defendant in *Goodwillie*, appellant and her attorney remained silent regarding her willingness to accept the plea offer and indicated no objection before the jury verdict was

taken. Appellant asks that we infer she would have accepted the offer absent the court's statement because it would have resulted in no further prison time. This inference is speculative, as it is equally likely that appellant took her chances, hoping for a hung jury. (*Miralrio, supra*, 167 Cal.App.4th at p. 464 [refusing to infer that appellant would have accepted plea deal based on its favorability in contrast with actual sentence].) The record contains no evidence indicating how the trial court's statement affected her decision-making process with respect to the plea offer.

Because the court's statement to appellant was accurate and appellant has shown no prejudice, we find no due process violation has been shown.

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.