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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.

KEITH RONDEAU,

Defendant and Appellant.

B236750

(Los Angeles County
Super. Ct. No. SA075886)

APPEAL from a judgment of the Superior Court for Los Angeles County,
H. Chester Horn, Jr., Judge. Affirmed.

A. William Bartz, Jr., 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, Shawn McGahey
Webb and Louis W. Karlin, Deputy Attorneys General, for Plaintiff and
Respondent.

Defendant Keith Rondeau appeals from a sentence imposed following a negotiated plea agreement. He was charged in a two-count felony complaint with attempted willful, deliberate and premeditated murder (Pen. Code,¹ §§ 664/187, subd. (a)), with personal use of a firearm (§ 12022.53, subd. (b)), and stalking (§ 646.9, subd. (a)). As part of the plea agreement, the complaint was amended to add a third count, for assault with a firearm (§ 245, subd. (a)(2)), to which defendant entered a plea of nolo contendere, and the other counts were dismissed. Under the terms of the plea agreement, it was agreed that defendant would be referred to the Department of Corrections and Rehabilitation for a diagnostic evaluation under section 1203.03, and that the Department's report would be submitted to the trial court to be considered at sentencing. Upon receipt and consideration of the section 1203.03 report, the trial court found that defendant was not a suitable candidate for probation, and sentenced defendant to three years in state prison. Defendant appeals, arguing that he was denied due process because the report, upon which the trial court relied in sentencing him, was based upon erroneous information. We affirm the judgment.

BACKGROUND

Our recitation of the facts related to the crime is based upon the probation officer's report, since there was no trial. On November 5, 2010, the victim, Kimberly A., went to dinner with defendant, her ex-boyfriend. She and defendant had been in a relationship for two years, and after they broke up, defendant stalked and harassed her. She agreed to go to dinner with him because she wanted to keep peace between them and avoid a confrontation.

¹ Further undesignated references are to the Penal Code.

After dinner, defendant was supposed to drive Kimberly home, but he drove past her street. Defendant told Kimberly that he wanted to spend more time with her, that it was “driving him crazy,” and that he could not “stand it anymore.” He pulled the car over to the side of the road, grabbed Kimberly by her hair, and pulled out a semi-automatic handgun. When she began to scream and hit defendant with her hands, he pressed the gun into her chest, said “I’m done with you, I’m going to kill you,” and pulled the trigger. Kimberly heard a “click,” but the gun did not fire. Defendant then said, “I can’t believe the gun didn’t go off.”

Kimberly pleaded for defendant to take her home. He refused, and instead said he was going to take her to his apartment. He told Kimberly that she was the source of his pain, and that they were both going to die.

On the way to his apartment, defendant pulled his car over to the curb again. A security guard drove by and asked if everything was okay. Kimberly shook her head, but it appeared that the guard did not see her. Defendant told him that everything was fine. After the guard drove off, defendant rolled down his window, saying that he wanted to see why the gun had not fired. He fired a shot into the bushes.

Defendant then drove to his apartment. Although defendant did not force Kimberly into his apartment, she followed him because she was afraid. Once inside, defendant told her that he could not live without her and did not know what he was going to do. He said he had planned to take her out to dinner and then kill her and himself. Kimberly convinced defendant to unload the gun, and he put it away in a metal case. He apologized for trying to kill her, and said he just wanted to talk to her. He eventually drove her home, and told her that if she called the police he would kill himself.

After the incident, defendant left Los Angeles and went to Las Vegas and then Oklahoma, where he was arrested. He was transported back to Los Angeles on November 17, 2010.

On May 5, 2011, defendant entered into a written plea agreement, and entered a plea of nolo contendere to one count of assault with a firearm (§ 245, subd. (a)(2)). Under the terms of the agreement, a 90-day diagnostic report would be prepared and submitted to the trial court for consideration at sentencing. The court accepted defendant's plea, and found defendant guilty of the charge.

The section 1203.03 report was submitted to the trial court on July 20, 2011. The clinical psychologist who examined defendant, the correctional counselors who interviewed him, and the warden of North Kern State Prison all concluded that defendant was not a suitable candidate for probation and recommended a term of imprisonment, based in large part on the serious nature of the offense, i.e., putting a gun to Kimberly's chest and pulling the trigger.² At the sentencing hearing, the trial court heard argument from the prosecution and the defense, including defense counsel's argument that the section 1203.03 report was flawed because the evaluators were under the impression that defendant was convicted of all three counts (attempted murder, stalking, and assault with a firearm) rather than a single count of assault with a firearm. After considering both sides' arguments, the court denied probation, stating, "I think that the seriousness of the conduct in this and [defendant's] apparent lack of appreciation for [the] seriousness of what he's done as demonstrated in the diagnostic report warrants a prison commitment in this case." The court ordered defendant to state prison for a term of three years.

² The clinical psychologist also noted that defendant denied and minimized the facts of the case, blamed the victim, and claimed that everything he had done was for her benefit, to "scare her straight" and make sure she was safe.

Defendant timely filed a notice of appeal as to a post-plea sentencing matter that does not affect the validity of the plea.

DISCUSSION

On appeal, defendant argues he was denied due process because, when sentencing defendant, the trial court relied on a section 1203.03 report that was based upon erroneous information. He contends he should be given an opportunity to have a new diagnostic evaluation performed and receive another sentencing hearing. We disagree.

While defendant is correct that the evaluators incorrectly stated that defendant had been convicted of three counts, including attempted murder, the reports make clear that the number or names of the counts had no bearing on their recommendations. Rather, the evaluators based their recommendations upon the conduct of defendant, i.e., putting a gun to the victim's chest and pulling the trigger. In addition, the clinical psychologist noted that defendant reported that the attempted murder and stalking charges had been dismissed. Nevertheless, she observed that defendant "was dismissive and minimized the severity of his actions," and that he stated that he believed the remaining assault with a firearm charge would be reduced to a misdemeanor. In addition, the psychologist noted that defendant appeared to be preoccupied with the victim and blamed her for his actions, and that he demonstrated little insight into his behavior and a lack of empathy for the victim. Therefore, it appears that the factual inaccuracies had little impact on the overall evaluation.

In any event, it is clear that the trial court was aware of the inaccuracies in the section 1203.03 report, and that it based its sentencing decision on the seriousness of defendant's conduct and his lack of appreciation for the seriousness of that conduct. "The mere presence of erroneous sentencing information in the

record does not require reversal; such information becomes constitutionally significant only if the sentencing court relies upon it.” (*People v. Tang* (1997) 54 Cal.App.4th 669, 678.) The record in this case shows that the trial court knew that the evaluators were under the incorrect impression that defendant had been convicted of three counts related to the conduct at issue, and properly exercised its sentencing discretion in light of all appropriate factors. Therefore, we must affirm the judgment. (*Id.* at p. 677 [noting that a trial court’s failure to properly exercise its sentencing discretion “must be demonstrated in the same manner as any other error. ‘We must indulge in every presumption to uphold a judgment, and it is defendant’s burden on appeal to affirmatively demonstrate error -- it will not be presumed’”], quoting *People v. Garcia* (1987) 195 Cal.App.3d 191, 198.)

DISPOSITION

The judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.