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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. ANTHONY GILES METZ, Defendant and Appellant.	B255293 (Los Angeles County Super. Ct. No. BA415992)

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

Jessica Coffin Butterick, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Appellant Anthony Giles Metz appeals from the judgment entered following his convictions by jury on two counts of first degree residential burglary. (Pen. Code, § 459; counts 1 & 2.) The court sentenced him to prison for seven years four months.
We affirm.

FACTUAL AND PROCEDURAL SUMMARY

1. *Facts of Appellant's Offenses.*

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that about the early morning on August 23, 2013, appellant entered the garage of an apartment complex at 1538 North Martel in Hollywood. Anthony Schermetzler was asleep in his apartment in the complex and his car was in the garage. After appellant entered the garage, he entered Schermetzler's car and stole some of his belongings inside. About the early morning of August 29, 2013, appellant again entered the garage while Schermetzler was in his apartment. Schermetzler's bicycle was in the garage. After appellant entered, he stole the bicycle, which was later found in the complex's fire escape. Some of the bicycle's reflectors had been removed.

Based on photographs obtained from surveillance video of the garage during the incidents, a police detective disseminated a crime alert. On September 5, 2013, a police officer assigned to the Hollywood station observed appellant sleeping near a stairwell of an apartment complex at 1200 North Mansfield. The officer determined appellant was the person depicted in the crime alert, and arrested him. Appellant presented no defense evidence.

2. *Procedural History.*

Based on the above August 23 and August 29, 2013 incidents, a felony complaint alleged, inter alia, appellant committed two counts, respectively, of first degree burglary. On October 15, 2013, the parties waived their rights to a preliminary hearing. On November 4, 2013, an information was filed alleging the two counts, and appellant pled not guilty. On March 6, 2014, jury selection began and a jury and two alternate jurors were sworn.

On March 7, 2014, the People presented their opening statement. The People's case-in-chief included surveillance video of a suspect entering the garages on August 23 and August 29, 2013, and entering Schermetzler's car on August 23, 2013. The parties stipulated at trial the video depicted appellant. Appellant argued to the jury as to count 1 he entered the garage looking for shelter without burglarious intent, and formulated an intent to steal, and stole, only when he opened car doors inside the garage. Appellant argued as to count 2 he may not have taken the bicycle but, even if he did, he did not remove it from the premises and the most that occurred was an "attempt." During deliberations, the jury asked for a playback of all August 29, 2013 videos, and the court granted the request. On March 7, 2014, the jury convicted appellant as previously indicated.

During the March 25, 2014 sentencing hearing, the court tentatively indicated as follows. The court would impose the high term and consecutive sentences. Appellant's crimes were numerous and of increasing seriousness, and there was sophisticated criminal behavior. Appellant entered an enclosed, secure parking garage early in the morning, and had specific intent to steal from as many cars as he could. He returned a few days later, wearing latex gloves and entering the property through the front door, "apparently" having found a key. There were no mitigating circumstances. Appellant's actions were inexcusable and deserved the maximum sentence.

After argument by appellant, the court sentenced him to prison for the six-year upper term on count 1. The court stated it found several aggravating factors. The court also stated appellant's crimes were numerous and of increasing seriousness. The court found no mitigating circumstances. The court sentenced appellant to prison on count 2 to a consecutive subordinate term of 16 months. On March 25, 2014, appellant filed a notice of appeal.

CONTENTIONS

After examination of the record, appointed appellate counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record.

By notice filed November 5, 2014, the clerk of this court advised appellant to submit by brief or letter within 30 days any contentions, grounds of appeal, or arguments he wished this court to consider. After this court, on November 13, 2014, and December 29, 2014, granted, at appellant's request, 30-day extensions of time, appellant, on January 2, 2015, filed a supplemental letter in which he made the claims addressed below.

Appellant claims the trial court presented false evidence to the jury because the crime alert "had photos from another charge that was dropped before trial." We reject the claim. As the trial evidence, and the brief filed by appellant's appellate counsel pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) reflect, the crime alert was based on photographs obtained from video of the garage during the incidents. Appellant stipulated he was the person depicted in the video, and there was overwhelming evidence of appellant's guilt. Even if the crime alert contained a photograph pertaining to another case, no prejudicial error occurred. (*Cf. People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705].)

Appellant claims the trial court impermissibly allowed a class ring to be shown to the jury. We conclude otherwise. A police officer testified he found the ring on appellant's person after detaining him on September 5, 2013. The ring was admitted into evidence. However, even if the ring was inadmissible, there was overwhelming evidence of appellant's guilt. No prejudicial error occurred.

Appellant claims no fingerprints were obtained, no stolen items were recovered from him, the video did not show any alleged stolen items, and the victim could not identify as his property any items in the suspect's hands. We reject the claim. This claim in essence is a sufficiency of the evidence claim. The evidence presented at trial was sufficient to support the verdicts. (*Cf. People v. Kelly* (2006) 40 Cal.4th 106, 126 (*Kelly*).)

Appellant claims his public defender had appellant admit appellant was depicted in the videos. Appellant argues he either had to make that admission or walk to the jury and display his tattoos so the jury could determine if he was depicted in the videos, and

he could not walk to the jury because the county jail had ignored court orders to provide him with crutches.

However, on March 7, 2014, when the trial court ordered appellant would have to walk in front of the jury and display his arms (where he apparently had tattoos), appellant objected it was irrelevant, unnecessary, a video was not clear, and the procedure was prejudicial. Appellant did not object he could not walk. Moreover, later on March 7, 2014, appellant's counsel indicated it was acceptable that appellant stipulate he was the person depicted in the videos. The trial court asked if appellant's counsel had consulted with appellant about the stipulation, and appellant's counsel, in appellant's presence, replied, "He's willing to stipulate." Appellant did not then personally indicate otherwise. The prosecutor represented the stipulation would "save[] [appellant] from having to show his tattoos." Neither appellant nor his counsel indicated otherwise. Later that day, appellant's counsel entered into the stipulation.

Appellant's counsel's decision to stipulate was a matter of trial tactics and strategy that an appellate court generally will not second-guess. (*Cf. People v. Mitcham* (1992) 1 Cal.4th 1027, 1059.) Moreover, appellant has failed to demonstrate the county jail ignored court orders to provide appellant with crutches on March 7, 2014, or that appellant would not have stipulated if crutches had been provided (assuming they were not). The jury reviewed the videos and was able to compare the suspect in the videos with appellant. No prejudicial error, or ineffective assistance of counsel (see *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217 (*Ledesma*)), occurred.

Appellant claims that, in light of the fact there was a pretrial plea bargain offer involving two years in prison, the trial court, by ultimately imposing a maximum prison sentence of seven years four months, punished appellant for going to trial. We reject the claim. A trial court may not impose a more severe sentence simply because a defendant elects to proceed to trial. However, a trial court's sentencing discretion is not limited by a pretrial plea bargain offer, and the trial court is not prohibited from imposing, after trial, a sentence more severe than that proposed in the pretrial plea bargain offer. Legitimate adverse information may come to a trial court's attention for the first time through, e.g.,

evidence at trial or a probation report, resulting in a lawful sentence more severe than that proposed by the plea bargain offer. (*In re Lewallen* (1979) 23 Cal.3d 274, 281.) Appellant has failed to demonstrate the trial court did anything other than impose such a lawful sentence here, and appellant has failed to demonstrate a violation of his right to a jury trial. (*Cf. People v. Angus* (1980) 114 Cal.App.3d 973, 989-991.)

Appellant claims a *Marsden*[1] motion should have been made based on a conflict of interest because, according to appellant, his trial counsel represented to the trial court she was "trying to get [appellant] a nonstrike" disposition, but was uncertain appellant believed this. Appellant suggests a conflict existed because appellant's counsel required the court to speak up on behalf of counsel because appellant did not believe counsel was working for appellant. Appellant also claims his trial counsel engaged in inappropriate conduct (1) by discounting the significance of appellant's assertion to her that he had been molested as a child, and (2) by stating instead that she too had been molested as a child but was now an attorney. We reject appellant's claims.

First, appellant's trial counsel represented to the trial court she had pleaded with the prosecutor to consider "anything lower than a two-year offer" but appellant's trial counsel was not sure appellant believed she had done so. Second, appellant's trial counsel did not ask the trial court to speak up for counsel, and appellant's trial counsel did not state appellant did not believe appellant's trial counsel had been working for appellant. Third, it was incumbent upon appellant to make any *Marsden* motion. (*Cf. Kelly, supra*, 40 Cal.4th at p. 121, fn. 4; *People v. Lucky* (1988) 45 Cal.3d 259, 281, fn. 8.) Appellant has failed to demonstrate his trial counsel provided inadequate representation, failed to demonstrate appellant and his counsel became embroiled in such an irreconcilable conflict that ineffective representation was likely to result (*People v. Jackson* (2009) 45 Cal.4th 662, 682), and failed to demonstrate ineffective assistance of counsel (see *Ledesma, supra,* 43 Cal.3d at pp. 216-217).

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[1] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

Appellant claims that, before trial, the trial court said there was an offer of four years in prison, appellant's trial counsel never told him about any offer, and a few days before trial the offer was, inter alia, two years in prison. However, when appellant was arraigned on November 4, 2013, his trial counsel represented to the court in the presence of appellant and the prosecutor that the People's offer was a low term of two years in prison on count 1. The parties announced ready for trial on March 4, 2014, and jury selection began on March 6, 2014. Appellant has failed to demonstrate the trial court ever said there was an offer of four years. Appellant did not even accept the two-year offer. Appellant makes related arguments that amount to challenging the sufficiency of the evidence, but the evidence was sufficient. No prejudicial error or ineffective assistance of counsel occurred.

Appellant claims the trial court erred during sentencing by relying on the aggravating factors that (1) the crime was planned and sophisticated, (2) his prior convictions were numerous or of increasing seriousness, (3) appellant was on probation when the crime was committed, (4) appellant used a key to enter the complex on August 29, 2013 (despite the alleged fact the trial court told the prosecutor not to mention to the jury appellant had used a key), and (5) appellant was engaged in violent conduct indicating he was a danger to society. Appellant also claims the trial court erred by relying on the mitigating factor that appellant acknowledged wrongdoing at an early stage of the proceeding.

However, although the probation report may have referred to some of the above factors, the trial court did not refer to any of them except for the first two above enumerated aggravating factors. Ample evidence supported them. A single aggravating factor is sufficient to justify imposition of an upper term. (*People v. Dreas* (1984) 153 Cal.App.3d 623, 636.) Moreover, the trial court indicated appellant entered the garage on August 29, 2013, "apparently" having found a key. No prejudicial error occurred.

REVIEW ON APPEAL

We have examined the entire record and are satisfied appellant's appellate counsel has complied fully with counsel's responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *Wende, supra*, 25 Cal.3d at p. 433.)

DISPOSITION

The judgment is affirmed.

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KITCHING, J.

We concur:

EDMON, P. J.

ALDRICH, J.