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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. JAMES EDWARD GREEN, Defendant and Appellant.	B232847 (Los Angeles County Super. Ct. No. NA086332)

APPEAL from a judgment of the Superior Court of Los Angeles County, Arthur Jean, Judge. Affirmed.

David L. Kelly, 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, Linda C. Johnson and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant James Edward Green appeals from the judgment entered following his convictions by jury on count 1 - assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)) and count 2 - false imprisonment by violence (Pen. Code, § 236) with court findings he suffered four prior felony convictions (Pen. Code, § 667, subd. (d)) and three prior felony convictions for which he served separate prison terms (Pen. Code, § 667.5, subd. (b)). The court sentenced appellant to prison for 25 years to life. We affirm the judgment.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence, the sufficiency of which is undisputed, established that on July 1, 2009, appellant committed the above offenses when he prevented Shavon Murphy from leaving a Signal Hill motel room and brutally beat her.

ISSUE

Appellant claims the trial court engaged in unlawful judicial plea bargaining, then punished him for exercising his right to a jury trial.

DISCUSSION

The Trial Court Did Not Engage in Plea Bargaining and Did Not Impermissibly Punish Appellant.

1. *Pertinent Facts.*

On February 28, 2011, the court called the case for a jury trial and stated without objection the following to appellant: "There is an offer by the district attorney of six years. If you don't want it, don't take it. If you want to take it, by all means do. If you don't, don't. [¶] This is a third strike case. As far as I am concerned, this is a [25-years-to-life] case. As far as I am concerned, you ought to spend the rest of your days in a California state prison. That is my view given your record and the nature of the charges in this case. That is the jeopardy, that is the danger that you face. [¶] They have offered you six. If you want to take it, do. If you don't, don't. We are ready to go to trial today. [The bailiff] will have some civilian clothes for you. We will bring a jury panel down. [¶] Why don't you talk to

[appellant's counsel]. And after you have talked to him if I can answer any questions for you, I will be glad to."

After appellant and his counsel conferred, appellant's counsel stated, "I have explained, your Honor, as the court did, we both made Mr. Green aware of his exposure. I have indicated to him that there are no guaranteed outcomes. If he loses, he will probably never see the light of day. He is insisting that he still wants to go to trial." The court replied, "Fine" and subsequently ordered a jury panel. Voir dire of prospective jurors later commenced.

After the jury retired for deliberations, appellant waived his right to a jury trial on his prior conviction allegations. The jury convicted appellant as previously indicated and, following a court trial on the prior conviction allegations, the court found them true as previously indicated.

During the April 5, 2011, sentencing hearing, the court indicated it had read the probation report.[1] Appellant's counsel argued as follows. Appellant was released on parole and had prior convictions. However, appellant had not committed a violent offense for a number of years prior to the present offenses. Appellant was 43 years old and the threat he posed to society would decrease. Appellant asked the court to strike all of appellant's strikes and "give him a term based on . . . no prior violent felony record."

The court stated, "You know, I disagree with you, [appellant's counsel]. I think Mr. Green is a dangerous man. He is going to hurt people. He is on parole for rape, a crime of violence. He previously committed multiple counts of robbery. I think he is a poster child for the [Three Strikes] law. [¶] So your motion under *Romero*[2] to strike strikes is denied."

The court then stated, "Mr. Green is committed to prison for the [25-years-to-life] sentence that he has richly deserved as to count one." The court concluded Penal Code

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1 The report reflected, inter alia, in 1997, appellant was convicted of " 'rape by force or fear – with prior' " (capitalization omitted) and sentenced to prison for 11 years. As indicated, the present offenses occurred in 2009.

2 *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*).

section 654 barred punishment on count 2, and the court indicated it would "strike the 667.5(b)" for purposes of sentencing.

2. *Analysis.*

Appellant claims as previously indicated. He argues the trial court engaged in impermissible judicial plea bargaining, i.e., coercing appellant to plead guilty by indicating the court would impose a prison sentence of 25 years to life if appellant chose to go to trial. He also argues the trial court punished appellant for exercising his right to a jury trial as to the offenses. We reject appellant's claim.

As to appellant's first argument, on February 28, 2011, the prosecutor, not the trial court, offered appellant a plea bargain of six years in prison if he pled guilty. The court made clear appellant could accept or reject the prosecutor's offer. The court altered no term of the prosecutor's offer. The court invited appellant to confer with his counsel and appellant did so. Appellant's counsel did not object to the court's comments, instead, after appellant conferred with his counsel, appellant's counsel indicated the court and appellant's counsel had made appellant aware of his exposure. After hearing the trial court's comments and conferring with his counsel, appellant insisted on going to trial with the risk, even the certainty, of a 25-years-to-life prison sentence if he were convicted.

Appellant suggests the trial court coerced him because, according to appellant, the court stated it *would* impose a prison sentence of 25 years to life. It is true the court indicated "this is a [25 years-to-life] case" and, as far as the court was concerned, appellant "ought to spend the rest of [his] days" in prison. However, we presume the experienced trial judge knew the law (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 913-914; *People v. Mosley* (1997) 53 Cal.App.4th 489, 496) and, therefore, knew that as of February 28, 2011, appellant was presumed innocent. Moreover, the two above quoted comments occurred in the context of the court's other comments apparently discussing the *possibility* (not certainty) of a prison sentence of 25 years to life, since the court stated, "That is the *jeopardy*, that is the *danger* that you face." (Italics added.)

In sum, the trial court's comments reasonably may be construed as indicating that, based on the trial court's understanding of the record as of February 28, 2011, appellant on that date faced the *danger* that if appellant rejected the prosecutor's offer and, after trial, appellant was convicted on all charges and allegations (and the record at the sentencing hearing did not otherwise materially differ from the record as it existed on February 28, 2011) the court would sentence appellant to prison for 25 years to life. The burden is on appellant to demonstrate error from the record; error will not be presumed. (*In re Kathy P*. (1979) 25 Cal.3d 91, 102; *People v. Garcia* (1987) 195 Cal.App.3d 191, 198.) The comments of the trial court conveyed appellant's exposure, but appellant has failed to demonstrate they constituted judicial plea bargaining.

Moreover, even if the court's pretrial comments conveyed, not merely the danger, but the *certainty*, that the court would impose a prison sentence of 25 years to life in the circumstances described in the above paragraph, the trial court would have been entitled to impose such a sentence. The court cannot be deemed to have coerced appellant by advising him the court would do something it would have been legally entitled to do. (See *People v. Mayfield* (1993) 5 Cal.4th 142, 176.) Finally, that the trial court did not coerce appellant to plead guilty is irrefutably demonstrated by the simple fact he did not plead guilty. Appellant has failed to demonstrate the court engaged in judicial plea bargaining.

Appellant's second argument is on April 5, 2011, the trial court punished appellant for exercising his right to a jury trial as to the offenses. However, as suggested by our previous discussion, the trial court's February 28, 2011, comments reasonably may be construed as indicating that, based on the trial court's assessment of the *record* as of that date, and not based on any exercise of appellant's right to a jury trial, if the charges and allegations were proven at a trial, and the record as of the date of the sentencing hearing remained substantially the same as the February 28, 2011, record, the court possibly would, or certainly would, impose a prison sentence of 25 years to life. The court did not state on February 28, 2011, it would punish appellant for any exercise of his right to a jury trial.

Indeed, the court, on April 5, 2011, indicated it had read the probation report. On that date, the court discussed, inter alia, appellant's then-existing status (i.e., his status at the sentencing hearing, after he had exercised his right to a jury trial) as a person on parole for rape. Appellant does not expressly challenge the validity of the trial court's denial of his *Romero* motion, i.e., a motion which required the trial court to consider various dispositional factors to determine whether he was then outside the spirit of the Three Strikes law. (See *People v. Williams* (1998) 17 Cal.4th 148, 161-164.) Nothing indicates appellant's sentence would have been different (1) if he had elected to have a court trial (instead of a jury trial) on the substantive offenses, or (2) if he had pled guilty to all of the charges and had admitted all allegations pursuant to an open plea. Appellant has failed to demonstrate the trial court punished him for exercising his right to a jury trial as to the offenses.

DISPOSITION

The judgment is affirmed.

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KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.