

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JULIO ALBERTO MARTINEZ,

Defendant and Appellant.

B277265

(Los Angeles County
Super. Ct. No. VA141613)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Reversed and remanded with directions for a new sentencing hearing.

Katherine E. Hardie, 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, Senior Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found Julio Martinez guilty of robbery after a trial at which Martinez represented himself. After the verdict, Martinez refused to return to the courtroom from his cell in lockup for the trial on the allegations of seven prior convictions, one of which was for a serious felony. The trial court appointed stand-by counsel to represent Martinez, including for the trial on the allegations of Martinez's prior convictions, which the jury found true.

At the sentencing hearing two weeks later, Martinez was again absent. Based on Martinez's conduct after the verdict and statements he made to his attorney and the bailiff, the trial court ruled that Martinez was voluntarily absent from the sentencing hearing. The court proceeded with the hearing in Martinez's absence and sentenced Martinez to a prison term of 11 years.

Martinez argues the trial court denied him his right to be present at the sentencing hearing. Because the record does not show Martinez voluntarily absented himself from the sentencing hearing, and because the trial court failed to impose or strike several enhancements, we reverse and remand to the trial court with directions to hold a new sentencing hearing.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Martinez Steals a Pair of Shoes*

Martinez entered a shoe store, walked down several aisles, and refused the help of a store employee. Martinez took a pair of new shoes from a box on the shelf, put the shoes on, placed his old shoes in the box, and returned the box to the shelf. An

employee saw Martinez complete the shoe swap, and the manager found the old shoes in the box on the shelf. The manager approached Martinez and asked him to return the new shoes. Martinez insisted the new shoes were his, pushed the manager, and hit him three times before leaving the store. No one from the store called the police.

Later, during her lunch break, another store employee saw Martinez walking in the street. The employee called the police and identified Martinez, whom the police subsequently detained. The People charged Martinez with second degree robbery and alleged he had served seven prison terms for felonies within the meaning of Penal Code section 667.5, subdivision (b),¹ one of them for a serious felony within the meaning of section 667, subdivision (a), and the three strikes law (§§ 667, subds. (b)-(i), 1170.12).

B. *Martinez Starts the Trial; Stand-by Counsel
Finishes It*

Martinez represented himself at trial. After both the manager and store employee identified Martinez as the man who stole the shoes, the jury found him guilty of second degree robbery.

After the jury returned its verdict, the court told the jury there would be a 15-minute recess before the bifurcated trial on the allegations of Martinez's prior convictions. Martinez stated, "I don't want to hear this shit, man. I don't want to hear this shit. . . . Fuckers." According to the court's minute order, Martinez was agitated and aggressive, "repeatedly stating he want[ed] the bailiffs to remove him from the courtroom." After

¹ Statutory references are to the Penal Code.

Martinez left the courtroom, the bailiff reported that Martinez refused to return for the bifurcated trial on the prior conviction allegations.

At the court's direction, the bailiff advised Martinez that, if he refused to return to the courtroom, the trial would continue in his absence. After relaying this message to Martinez, the bailiff advised the court that Martinez had refused to return to the courtroom for the trial on the prior conviction allegations and that Martinez had told the bailiff to "fuck off." According to the bailiff, Martinez said, "The court's gonna do what the fuck they want to do."

Based on this information, the trial court revoked Martinez's self-representation privileges and appointed stand-by attorney Marc Gibbons to represent Martinez for the remainder of the case. Gibbons, who also spoke with Martinez, confirmed that, after Gibbons told Martinez the trial would continue in his absence, Martinez told Gibbons to "do it for me." Martinez also told Gibbons, "Get away. Get out of here."

Gibbons represented Martinez during the bifurcated trial on the prior conviction allegations, and Martinez was absent. The jury found the prior conviction allegations true. The court excused the jury, scheduled a sentencing hearing, and ordered Martinez to appear on the next court date.

C. *The Trial Court Sentences Martinez in His Absence*

Martinez was not present at the sentencing hearing. The court noted Martinez had refused to cooperate after the jury returned its verdict and had been absent during the prior convictions phase of the trial.

Gibbons told the court he had last spoken to Martinez “after the last appearance” (i.e., the last day of trial), prior to the bifurcated trial on Martinez’s prior convictions. According to Gibbons, this conversation occurred in the lockup area while Martinez was in custody. Gibbons reported that Martinez had stated to him, “The court’s going to give me what they’re going to give me, and let them do what they are going to do.” Gibbons said Martinez did not want to talk to him, and Martinez refused to return to the courtroom and cooperate with Gibbons for the trial on the prior convictions. The court asked Gibbons if Martinez “refuse[d] to come to court and cooperate with” him. Gibbons responded, “Yes, he did.”

After the discussion with Gibbons, the court mentioned a reason Martinez apparently gave jail personnel for not attending the sentencing hearing. The court stated: “There was a misunderstanding, and [jail personnel] put [Martinez] as an inmate court refusal. The reason for refusal was that the inmate refused to go to court. Inmate stated, ‘I spoke to my wife, and she told me that I don’t have to go until tomorrow.’” The record does not identify the person to whom Martinez made this statement, nor does it indicate whether the trial court was repeating what it had been told verbally or reading a note written during or after Martinez had stated he believed the hearing was the following day.

After reading this statement into the record, the court stated, “[A]s far as I’m concerned, [Martinez] has intentionally and willfully absented himself and refused to come to court, so I think we can proceed in his absence.” The court found that Martinez “intentionally, willingly, and with full understanding that the hearing would take place in his absence refused to

return to court for this sentencing hearing.” Neither counsel objected to proceeding with sentencing in Martinez’s absence, although the prosecutor stated, “I’d rather [Martinez] be here.”

During the hearing, Gibbons did not offer any mitigating evidence. The court sentenced Martinez to 11 years in state prison, consisting of the middle term of three years, doubled under the three strikes law, plus five years under section 667, subdivision (a)(1), for the prior serious felony conviction. The court did not impose, strike, or mention the one-year enhancements under section 667.5, subdivision (b). Gibbons told the court he would “write [Martinez] a letter” to let him know what the sentence was.

DISCUSSION

A. *Applicable Law and Standard of Review*

A defendant has a right under the federal and state constitutions to be present at all critical stages of a criminal prosecution, including sentencing. (U.S. Const., 6th & 14th Amends.; *Kentucky v. Stincer* (1987) 482 U.S. 730, 745; Cal. Const., art. I, §§ 15, 16; see *People v. Doolin* (2009) 45 Cal.4th 390, 453 [sentencing is a critical stage]; *People v. Fedalizo* (2016) 246 Cal.App.4th 98, 118 [“[s]entencing is a critical stage in the criminal process within the meaning of the Sixth Amendment”].) The right to be present at sentencing is also guaranteed by statute. (§§ 977, subd. (b), 1193, subd. (a); see § 1043 [requiring a felony defendant’s presence at trial].)

The right to be present, however, is not absolute, and a defendant can waive it by voluntarily absenting himself or herself from the court proceedings. (*Taylor v. United States* (1973) 414 U.S. 17, 20; *People v. Robertson* (1989) 48 Cal.3d 18, 60; see *People v. Espinoza* (2016) 1 Cal.5th 61, 72 [a defendant’s voluntary absence “operates as a waiver of his right to be present,” italics omitted]; *People v. Concepcion* (2008) 45 Cal.4th 77, 82, fn. 7 [“the doctrine that a defendant impliedly waives the right of presence by voluntarily absenting himself from trial has been well established . . . for almost a century”].) Thus, “a trial court may continue a trial in a custodial defendant’s absence after the trial has commenced in the defendant’s presence—without first obtaining the defendant’s written or oral waiver of the right to presence—if other evidence indicates the defendant has chosen to be absent voluntarily. While a defendant’s express waiver in front of the judge might be the surest way of ascertaining the defendant’s choice, it is not the only way.” (*People v. Gutierrez* (2003) 29 Cal.4th 1196, 1206.) A defendant can also lose his or her right to be present by engaging in disruptive behavior in the courtroom. (See *Illinois v. Allen* (1970) 397 U.S. 337, 343 [a defendant’s disruptive behavior can waive the right to be present, and “trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case”]; accord, *King v. Superior Court* (2003) 107 Cal.App.4th 929, 943.)

Under section 1043, subdivision (b)(2), the “absence of the defendant in a [non-capital] felony case after the trial has commenced in his presence shall not prevent continuing the trial to, and including, the return of the verdict” where “the defendant

is voluntarily absent.” Section 1193, subdivision (a), provides that, if the defendant is not present in a felony case, the court may not pronounce judgment unless the defendant has personally waived the right to be present and the court appoints counsel in cases where the defendant is self-represented. The court, however, “after the exercise of reasonable diligence to procure the presence of the defendant,” may pronounce judgment in the defendant’s absence if the court finds it is in the interest of justice. (*Ibid.*; see *People v. Williams* (1944) 24 Cal.2d 848, 853; *Polanski v. Superior Court* (2009) 180 Cal.App.4th 507, 546.)

“The role of an appellate court in reviewing a finding of voluntary absence is a limited one. Review is restricted to determining whether the finding is supported by substantial evidence.” (*People v. Espinoza, supra*, 1 Cal.5th at p. 74; see *People v. Concepcion, supra*, 45 Cal.4th at p. 84.) “In determining whether a defendant is absent voluntarily, a court must look at the “totality of the facts.”” (*People v. Espinoza*, at p. 72; see *People v. Gutierrez, supra*, 29 Cal.4th at p. 1205.)

B. *There Is No Substantial Evidence Martinez Was Voluntarily Absent from the Sentencing Hearing*

Martinez argues the trial court erred in sentencing him in his absence because he was not voluntarily absent from the sentencing hearing. He also contends the court made an insufficient inquiry into whether his absence from the sentencing hearing was voluntary. The record supports Martinez: Substantial evidence does not support the trial court’s finding that Martinez was voluntarily absent from the sentencing hearing.

Martinez was not present in the courtroom when the court set the sentencing hearing, and there is no evidence anyone told Martinez when the sentencing hearing would occur. Gibbons, who was representing Martinez when the court set the sentencing hearing, never said he told Martinez when sentencing was, and Gibbons had not spoken with Martinez since before the bifurcated trial on Martinez's prior convictions. Nor is there any evidence anyone else told Martinez when sentencing would be. (See *People v. Davis* (2005) 36 Cal.4th 510, 532 [defendant did not waive his right to be present because there was "no evidence that defense counsel informed defendant of his right to attend the hearing; nor [was] there evidence that defendant understood that by absenting himself from the hearing he would be unable to contribute to the discussion"]; cf. *People v. Lewis* (1983) 144 Cal.App.3d 267, 279 [defendant voluntarily waived his right to be present where "[t]he court advised defendant of his right to be present at trial before each session commenced, yet [the defendant] reiterated his desire to remain in the lockup rather than to participate in the trial"].) To the contrary, the evidence suggested Martinez was confused about the date of his sentencing hearing. When Martinez decided not to leave his cell to attend his sentencing hearing, he apparently told jail personnel his wife had told him he did not have to attend court until the next day. There is no evidence anyone ever corrected him.

Moreover, Gibbons and, at the court's direction, the bailiff advised Martinez that the trial would continue in his absence, but neither one mentioned the sentencing hearing. Nor is there any evidence Martinez still held negative feelings about returning to court or cooperating with Gibbons after he refused to

return to the courtroom for the bifurcated trial on his prior convictions. Martinez undoubtedly was upset about the adverse jury verdict, but the two-week period between the trial and sentencing was a sufficient opportunity for Martinez to calm down and change his mind about participating in his case. There is no evidence that Martinez's hostility continued after the trial ended, or that Martinez made any statements or gave any indication he did not want to attend his sentencing hearing, if and when he ever learned about it.

Finally, the record does not show the trial court made a sufficient inquiry and investigation to make sure Martinez had voluntarily absented himself from the sentencing hearing. Because a "defendant's right to presence is 'fundamental to our system of justice and guaranteed by our Constitution' [citation] a trial court should not 'summarily plung[e] ahead' with trial in a defendant's absence" and must take "reasonable steps to determine that defendant was 'voluntarily absent' before continuing with the trial in his absence." (*People v. Gutierrez, supra*, 29 Cal.4th at p. 1209; see *People v. Mendoza* (2015) 241 Cal.App.4th 764, 781 [under section 1193, subdivision (a), "a defendant must be personally present, and if he is not the court cannot pronounce judgment unless a proper showing of diligence is made"]; see also *People v. Brown* (1951) 102 Cal.App.2d 60, 63 ["the record must show that diligent effort has been made to find the defendant, and the reason for his absence"].) This duty to conduct a diligent inquiry applies to both custodial and noncustodial defendants. (See, e.g., *People v. Espinoza, supra*, 1 Cal.5th at pp. 72, 75; *Gutierrez*, at p. 1206.)

For example, in *People v. Espinoza, supra*, 1 Cal.5th 61 the trial court made a sufficient investigation to support its finding that the defendant was voluntarily absent. In that case, the trial court “determined that defendant knew his trial had commenced, that it was scheduled to continue the next day, and that he had both a right and an obligation to be present in court in the morning for the trial to proceed.” (*Id.* at p. 74.) The trial court also “expressly noted the conversations it had in defendant’s presence about the schedule for the trial” and the court “observed that defendant had been given a copy of the rules of court informing him of the requirement that he be in court every day by 8:45 a.m.” (*Ibid.*) The trial court also found that the defendant’s purpose in failing to appear was delay, evasion of the trial, and avoidance of punishment. In light of these facts, the Supreme Court held the trial court had “made the necessary factual findings for an effective waiver of defendant’s right to be present at trial.” (*Ibid.*; see *People v. Gutierrez, supra*, 29 Cal.4th at p. 1209 [trial court took reasonable steps to determine custodial defendant was voluntarily absent under section 1043, subdivision (b)(2), before continuing with the trial in his absence].)

In contrast, the trial court here summarily ruled Martinez’s absence at the sentencing hearing was voluntary based on stale, secondhand information and without an adequate inquiry. The court gave three reasons for its finding that Martinez was absent voluntarily: (1) Martinez’s refusal, according to the bailiff and Gibbons, to come out of his jail cell for the bifurcated trial on the prior conviction allegations two weeks before sentencing; (2) Gibbons’s recounting of his conversation with Martinez about the bifurcated trial,, also two weeks before the sentencing hearing;

and (3) an “inmate refusal report” the court read into the record that included a statement that Martinez said his wife said about not having to go to court the day of the hearing. By the time of the sentencing hearing, these were old facts. The court did not ask any questions or receive any information about what had happened in the two weeks since the trial ended, and the People do not identify any statement or conduct occurring between the end of the trial and the date of the sentencing hearing indicating Martinez did not want to attend the sentencing hearing, other than the incorrect, double-hearsay statement by Martinez’s wife. The court also did not ask whether or how Martinez knew the date of the sentencing hearing, whether Gibbons had any conversations with Martinez since the trial, or whether anyone had corrected the incorrect information Martinez apparently received from his wife. The court also did not investigate whether, at the time of sentencing, Martinez still had the same emotions that had caused him to refuse to return to the courtroom for the bifurcated trial on his prior convictions. And the trial court did not make any findings that Martinez was refusing to come to court to delay the proceedings, evade sentencing, or avoid punishment.

To be sure, “a trial judge may rely on reliable information, such as statements from jail or court personnel, to determine whether a defendant has waived the right to presence.” (*People v. Gutierrez, supra*, 29 Cal.4th at p. 1205.) There was no such reliable information here, however, that Martinez voluntarily decided not to attend the sentencing hearing, as opposed to the

trial on his prior convictions.² The trial court erred in conducting the sentencing hearing without Martinez present.

The People argue Martinez “voluntarily waived his presence at the sentencing hearing” because he was “upset and disruptive” when the jury returned a guilty verdict and he “refused to come back to the courtroom for the priors trial.” The trial court, however, did not find Martinez waived his right to be present at trial because he was disruptive. As noted, a “defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.” (*Illinois v. Allen, supra*, 39 U.S. at p. 343; see *People v. Mayham* (2013) 212 Cal.App.4th 847, 850-851). The trial court did not warn Martinez his behavior would cause the court to remove him, nor did Martinez continue to misbehave in the courtroom. While Martinez may have been disruptive in the courtroom after the jury returned its verdict, the court did not remove him from the courtroom for that reason. Rather, Martinez decided not to return to the courtroom after the recess following the verdict.

² As noted, Martinez does not argue the trial court failed to take reasonable steps to ensure Martinez was voluntarily absent from the bifurcated trial on the prior conviction allegations. (See *People v. Gutierrez, supra*, 29 Cal.4th at p. 1206 [“[i]n determining whether a custodial defendant who refuses to leave the lockup is ‘voluntarily absent’ [citation], a trial court should take reasonable steps to ensure that being absent from trial is the defendant’s choice”].)

C. *The Error Was Not Harmless*

“Erroneous exclusion of the defendant is not structural error that is reversible per se, but trial error that is reversible only if the defendant proves prejudice.” (*People v. Perry* (2006) 38 Cal.4th 302, 312.) Because the right to be present at sentencing is a federal constitutional right, the “harmless beyond a reasonable doubt” standard of *Chapman v. California* (1967) 386 U.S. 18, 24 applies. (See *People v. Davis, supra*, 36 Cal.4th at p. 532 “[u]nder the federal Constitution, error pertaining to a defendant’s presence is evaluated under the harmless beyond a reasonable doubt standard set forth in *Chapman*”]; accord, *People v. Robertson, supra*, 48 Cal.3d at p. 62.) A statutory error “is state law error only, and therefore is reversible only if “it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of error”” under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Davis, supra*, 36 Cal.4th at pp. 532-533.) The defendant has the burden of demonstrating that the absence resulted in prejudice or denied his or her right to a fair hearing or trial. (*People v. Blacksher* (2011) 52 Cal.4th 769, 799.)

Martinez has shown prejudice. There is no indication that Gibbons spent any time with Martinez discussing sentencing or that he communicated with Martinez about anything other than his absence from the bifurcated trial on the prior conviction allegations. As far as the record is concerned, Martinez had no opportunity to assist Gibbons with presenting evidence and argument regarding the discretionary sentencing choices the trial court could have made at the hearing, including sentencing Martinez to the lower term of two years rather than the middle term of three years, striking some or all of Martinez’s prior

convictions, and dismissing the prior serious felony conviction under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. Martinez also did not have an opportunity to address the court or to communicate with Gibbons on any of these issues. (Cf. *People v. Robertson, supra*, 48 Cal.3d at p. 62 [error was harmless where the defendant had the opportunity to express remorse before the hearing for which he was absent, by which time the court had deliberated carefully and at length over the evidence and arguments].) Martinez’s lack of communication with his attorney and participation in the sentencing hearing was not harmless beyond a reasonable doubt.

The People argue the violations of Martinez’s constitutional and statutory rights were harmless because Martinez’s personal presence would not have assisted his defense and it is “highly unlikely” that any motion to strike one or more of his seven prior convictions would have been successful. While there undoubtedly is some statistical uncertainty about the likelihood that Martinez’s participation in the hearing would have resulted in a different sentence, there is more to Martinez’s constitutional and statutory rights than statistics. (See *In re Cortez* (1971) 6 Cal.3d 78, 86, fn. 8 [“the question whether the defendant should be accorded a hearing should not turn upon an empirical predetermination of the likelihood of its success”]; *People v. Hernandez* (2009) 172 Cal.App.4th 715, 722 [“[t]he right to be heard does not depend upon an advance showing that one will surely prevail at the hearing”]; see also *People v. Garcia* (1995) 32 Cal.App.4th 1756, 1771 [“[t]o say that sentencing decisions are discretionary is to say that different reasonable decision makers—or, as in this case, the same reasonable decision maker at different times—could arrive at different decisions, even on the

same facts”].) And Martinez’s sentencing hearing included more than “routine procedural discussions on matters that do not affect the outcome of the trial.” (*People v. Perry, supra*, 38 Cal.4th at p. 312.)

D. *The Trial Court Erred in Not Striking or Imposing the One-Year Enhancements*

As noted, the jury convicted Martinez of second degree robbery and found true the allegations Martinez had suffered seven prior felony convictions, including a conviction for a serious felony. The court sentenced Martinez to the middle term of three years, doubled under the three strikes law, plus five years under section 667, subdivision (a). The court, however, did not impose or strike any of the one-year enhancements under section 667.5, subdivision (b), for the six non-serious felony convictions.³ This was error. At the new sentencing hearing, the court must either strike or impose the one-year enhancements. (See *People v. Langston* (2004) 33 Cal.4th 1237, 1241 [“[o]nce the prior prison term is found true within the meaning of section 667.5(b), the trial court may not stay the one-year enhancement, which is mandatory unless stricken”]; accord, *People v. Lua* (2017) 10 Cal.App.5th 1004, 1020).

³ The court may not impose both the five-year enhancement under section 667, subdivision (a), and the one-year enhancement under section 667.5, subdivision (b), for the same conviction. (*People v. Jones* (1993) 5 Cal.4th 1142, 1153; *People v. Walker* (2006) 139 Cal.App.4th 782, 794.)

DISPOSITION

The judgment is reversed and the case is remanded to the trial court with directions to hold a new sentencing hearing, with Martinez having the opportunity to be present. In connection with the new sentencing hearing, the trial court must either strike or impose the one-year enhancements under section 667.5, subdivision (b).

SEGAL, J.

We concur:

ZELON, Acting P. J.

BENSINGER, J.*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.