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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. LAWRENCE GRAY, JR., Defendant and Appellant.	B285171 (Los Angeles County Super. Ct. No. NA101494)

APPEAL from a judgment of the Superior Court of Los Angeles County, James Otto, Judge. Affirmed.

Byron C. Lichstein, 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, Scott A. Taryle and David W. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

Following his arrest on a felony charge of committing domestic violence and a probation violation hearing, Lawrence Gray, Jr.'s probation was terminated; and he was ordered to serve a previously imposed five-year state prison sentence for possession of a controlled substance for sale. On appeal Gray contends, and the Attorney General agrees, it was error for the court to terminate his probation without first ordering and reviewing a current probation report. Gray argues the error requires automatic reversal and remand for a new probation hearing and, in any event, under the circumstances here the error cannot be considered harmless. The Attorney General, on the other hand, argues failing to obtain a current probation report was harmless in this case. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Gray's 2015 Arrest for Possession for Sale of a Controlled Substance*

While on patrol on March 15, 2015, Long Beach Police Officer Andrew Fox came into contact with Gray, whom he recognized as a parolee. Fox stopped Gray and conducted a parole search. In Gray's jacket pocket Fox found two segments of pills he believed to be alprazolam, a controlled substance, as well as a motel key card and $77. Fox's partner found a cell phone and two additional pieces of an alprazolam pill in Gray's car. Gray acknowledged the phone was his and said he had received it from Gregory Leonard.

Fox and his partner located the motel room corresponding to the key card. As they walked toward the room, they met Leonard. A search of Leonard uncovered two pill bottles of alprazolam and a bottle of promethazine. Neither Gray's nor Leonard's name was on the prescription label for any of the

bottles. After Leonard unlocked the cell phone for the officers, Fox found text messages and photographs evidencing the sale of pills. Gray was arrested and charged with felony possession for sale of a designated controlled substance pursuant to Health and Safety Code section 11375, subdivision (b)(1).

2. *Gray's Probation Following a Plea to the Charge of Possession for Sale of a Controlled Substance*

On April 3, 2015 a probation officer prepared an early disposition report. The report provided biographical information about Gray, including his criminal history. Gray had four felony convictions and five misdemeanor convictions and was on parole for a robbery conviction at the time of the drug arrest. Pursuant to Penal Code section 1170.12, subdivision (b)(1),[1] and section 667.5, subdivision (c)(9), robbery is a violent felony for purposes of determining probation eligibility. Accordingly, the probation officer reported Gray was ineligible for probation pursuant to section 1170.12, subdivision (a)(2).[2] The officer also stated Gray was ineligible for probation pursuant to section 1203, subdivision (e)(4),[3] unless "the court finds this to be an unusual case."

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[1] Statutory references are to this code unless otherwise stated.

[2] Section 1170.12, subdivision (a)(2), provides probation shall not be granted if a "defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior serious and/or violent felony convictions," as specially defined.

[3] Section 1203, subdivision (e)(4), provides probation shall not be granted to any person with two prior felony convictions

In his evaluation recommending against probation should Gray be convicted, the probation officer considered not only Gray's statutory ineligibility but also the fact that Gray was a gang member with a prior felony conviction record, had served time in prison and was on parole but continued to commit crimes as a parolee, and had a prior record of selling narcotics and committing crimes with victims.

Pursuant to a negotiated agreement, Gray pleaded no contest to the drug charge on July 20, 2015; and the People dismissed the allegation of Gray's prior "serious and/or violent felony" conviction, a prior strike, which, among other things, allowed Gray to be eligible for probation. The trial court sentenced Gray to five years in state prison, suspended execution of the sentence and placed Gray on formal probation for a period of three years. Among the conditions of his probation were that Gray not use, or threaten to use, force or violence on any person and that Gray obey all laws, orders, rules and regulations of the court and the probation department. Gray was advised by the trial court, unless he complied with all of the conditions of his probation, he would "be going off to prison for five years."

3. *Gray's 2017 Arrest on a Domestic Violence Charge*

On February 22, 2017 Gray was arrested on a felony domestic violence charge—specifically, the willful infliction of corporal injury on a person with whom he has or had a dating relationship. (§ 273.5, subd. (a).) At a hearing on March 16, 2017 the trial court summarily revoked Gray's probation and set a date for the scheduling of a probation violation hearing.

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except "in unusual cases where the interests of justice would best be served if the person is granted probation."

4. *The March 2017 Probation Violation Hearing*

Gray's probation revocation hearing was held on March 30, 2017, concurrently with the preliminary hearing on the new domestic violence charge. The trial court heard testimony from four witnesses: Terri Pierce, Alexis Borrow and Long Beach Police Officers Matthew Stolarski and Daniel Gibson.

Pierce testified on February 22, 2017 she looked out her kitchen window facing west and saw a man and a woman arguing in a black Mercedes parked directly in front of her house. The car windows were down. The woman was sitting in the front passenger seat facing north, so Pierce could see the right side of the woman's face. Pierce had never seen the woman before and did not recognize the man in the car. Pierce explained, although she has no personal relationship with Gray, she knows what he looks like because he lives in her neighborhood and he was not the man in the car.

Pierce stepped away from her kitchen window for 10 minutes. When she returned, the car windows were up; and the woman's body was pivoted toward the west, so that her back was now somewhat facing Pierce. Despite the change in position, Pierce could still see the side of the woman's face. The man was still in the driver's seat and was doing something with his hands while the woman watched. A couple of seconds later the man tilted his car seat back, so it was behind the woman's seat, placed what appeared to be a thin white plastic rope around the woman's neck, pulled the woman back with the cord and began to strangle her. The woman grabbed at her neck.

The man pulled on the cord multiple times for 45 to 60 seconds. After one hard jolt the woman's body went limp and fell to the right against the passenger window. The man pushed

a button, and the car window went down. He pulled on the woman's left arm, but the woman did not move. Once he released the woman's arm, her body went limp again; and the man sat for a while before starting to drive away. The man leaned over, shook the woman's body and continued shaking it while driving the vehicle, which slowly moved forward, hit a parked car and stopped in the middle of a right turn at the next block.

By this point Pierce had called the 911 operator and described what she saw as events unfolded. She was able to provide the operator a partial license plate number for the Mercedes.

Officer Stolarski, who responded to the call, testified he saw a parked black Mercedes occupied by Gray and Borrow near Pierce's home. A search of the car produced a pair of white or light-colored earphones or earbuds near the front passenger seat.

Officer Gibson and his partner arrived at the scene to assist Officer Stolarski. Gibson interviewed Borrow, who told him she and Gray had been arguing about their relationship when Gray choked her by forming a "c-clamp" with his left hand for 10 seconds. She thought she was going to die and almost lost consciousness. She tried to push Gray off her. Gray tossed Borrow's cell phone in her direction, and it hit her on her upper lip. Gibson saw a small cut on Borrow's upper lip, which was bleeding. He did not observe any injuries around Borrow's neck.

Officer Gibson's testimony was contradicted by Borrow, who testified she had tried to choke herself while she and Gray were sitting in the Mercedes, which was parked near Pierce's house. According to Borrow, she took a phone charger, put one end of its cord out the open car window, wrapped the other end around her neck and rolled the power window up. As the window

closed completely, the cord tightened around Borrow's neck. When Gray noticed what Borrow was doing, he quickly tried to unwind the cord from around her neck. Borrow finally rolled the window down and loosened the cord herself.

Frightened and upset with Borrow for trying to harm herself, Gray asked what she was doing and what was wrong with her. He also moved the car around the corner and reparked because Borrow was being too loud. When Gray finished speaking, Borrow asked for her phone. Gray tossed it to her. When Borrow grabbed her phone, she accidentally hit herself in the mouth with it. Borrow then saw police lights, and police officers came to the car and asked Borrow if Gray had hurt her. She responded in the negative to the officers.

Borrow testified she did not tell the officers Gray had tried to choke her. She admitted she had not explained she had tried to choke herself but claimed she had been afraid she would be placed in a 72-hour hold because she had a history of attempted suicide and had previously been held for psychiatric evaluation. She also said she had outstanding warrants and was just trying to cooperate with the officers.

After hearing the four witnesses testify, the trial court found Gray had violated his probation and ordered Gray held to answer on the new domestic violence charges.

5. *The July 26, 2017 Probation Termination Hearing*

At the July 26, 2017 probation termination hearing the prosecutor informed the court the domestic violence case had been dismissed because the People were unwilling to request issuance of a body attachment for Borrow, the victim of domestic violence. Gray's counsel advised the court no probation report had ever been received in the drug case. The prosecutor clarified

there was an early disposition report. The court stated, "I don't know why I would need one frankly. You agree what went on, the basis of his conduct was a new case, went to preliminary hearing. Preliminary hearing held him to answer, found him in violation of probation. So I don't think I need anything else." The court also explained it had read the parties' sentencing memoranda, as well as the police reports of the domestic violence incident and the transcript on the prior drug case.

After hearing argument of counsel, the court reaffirmed that Gray had been found to have violated the conditions of his probation and declined to reinstate probation. The court ordered termination of Gray's probation and execution of the previously suspended five-year state prison sentence.

DISCUSSION

1. *The Trial Court Erred in Failing To Order and Review a Current Probation Report Before Terminating Gray's Probation*

Section 1203, subdivision (b), requires a presentence probation report in every case in which the defendant has been convicted of a felony and is eligible for probation. Section 1203.2, subdivision (b), requires referral to the probation officer, preparation of a written report and its consideration by the court upon a petition for revocation of probation. (*People v. Dobbins* (2005) 127 Cal.App.4th 176, 180 (*Dobbins*).) In addition, California Rules of Court, rule 4.411(a)(2) provides, "[T]he court must refer the case to the probation officer" for a "supplemental report if a significant period of time has passed since the original report was prepared." A period of more than six months may

constitute a "significant period of time." (See *Dobbins*, at p. 181 [error when most recent probation report was eight months old].)

Here, the probation department prepared a presentence report (labeled an early disposition report) in 2015, two years prior to the court's order terminating probation. Gray argues, the People concede, and we agree the trial court erred by failing to order and review a current probation report before terminating Gray's probation. The People also acknowledge defense counsel's failure to object to the lack of a current probation report does not forfeit the issue. (See § 1203, subd. (b)(4); *Dobbins*, *supra*, 127 Cal.App.4th at p. 182.)

2. *The Trial Court's Failure To Order and Review a Current Probation Report Does Not Constitute Structural Error, Reversible Per Se*

Relying primarily on what several cases do not say, rather than any holding or even dicta in decisions addressing the failure of a court to order a supplemental probation report, Gray contends the trial court's error in this case is reversible per se, entitling him to a new probation termination hearing. Gray's argument fundamentally misapprehends the law governing reversible error.

An error is reversible per se only if it constitutes a "structural defect" (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306-310 [111 S.Ct. 1246, 113 L.Ed.2d 302]; *People v. Stewart* (2004) 33 Cal.4th 425, 461-463; see *People v. Hurtado* (2002) 28 Cal.4th 1179, 1190 [harmless error test of *People v. Watson* (1956) 46 Cal.2d 818 applies to "all nonstructural state law error"]), that is, an error that affects "the framework within which the trial proceeds, rather than simply an error in the trial process itself," and impacts the "entire conduct of the trial from

beginning to end." (*Fulminante*, at pp. 309-310.) Even federal constitutional errors generally do not rise to the level of a structural defect defying harmless error analysis. (See *id*. at pp. 306-310; *People v. Cahill* (1993) 5 Cal.4th 478, 490-491, 501-502 ["'it does not follow that every invasion of even a constitutional right necessarily requires a reversal'"; the types of errors that, "without regard to the strength of the evidence presented at trial," may result in a "'miscarriage of justice' . . . all involve fundamental 'structural defects' in the judicial proceedings"].) A "strong presumption" exists against finding an error to constitute a structural defect, and "it is the rare case in which a constitutional violation will not be subject to harmless error analysis." (*People v. Marshall* (1996) 13 Cal.4th 799, 851; see *People v. Vasquez* (2006) 39 Cal.4th 47, 66 [only "certain fundamental errors in procedure, sometimes referred to as "'structural,'" 'are not susceptible to the "ordinary" or "generally applicable" harmless error analysis'"].) The "total deprivation of the right to counsel at trial" and "trial before a judge who is not impartial" are among the rare errors that have been held to constitute structural defects. (*Marshall,* at p. 851.)[4]

The failure of the trial court to order and review a current probation report does not so fundamentally infect the

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[4] There are a few constitutional errors that the United States Supreme Court has categorized as structural, not because they defy harmless error analysis, but because prejudice is irrelevant and reversal deemed essential to vindicate the particular constitutional right at issue. (See *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 149, fn. 4 [126 S.Ct. 2557, 165 L.Ed.2d 409] [giving as examples denial of the right of self-representation, violation of the public-trial guarantee and selection of a trial jury using improper criteria].)

decisionmaking at a probation revocation or termination hearing that it constitutes a structural defect requiring reversal without analysis of possible prejudice. It is, instead, an error in the trial process subject to harmless error review. (*Dobbins*, *supra*, 127 Cal.App.4th at p. 182 [holding trial court's error in failing to order and consider an updated or supplemental probation report does not require automatic reversal].)

In support of his contention that failure to obtain and review a current probation report requires automatic reversal, Gray relies on *People v. Rojas* (1962) 57 Cal.2d 676, *People v. Mariano* (1983) 144 Cal.App.3d 814 and *People v. Keller* (1966) 245 Cal.App.2d 711. Each of these decisions reversed or vacated the trial court's judgment or order for failure to obtain a current probation report without any discussion whether the error was prejudicial. None held the lack of a current probation report constituted reversible error per se. "It is axiomatic that a case is not authority for an issue that was not considered." (*People v. Brooks* (2017) 3 Cal.5th 1, 110.)[5]

In addition, *Rojas* and the other cases relied upon by Gray were decided before *Arizona v. Fulminante*, which, as explained, held even federal constitutional error must constitute a fundamental structural defect for harmless error analysis to be inapplicable. (See 6 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Reversible Error, § 23, pp. 547-548 [explaining that some older opinions had reversed trial court judgments without applying a harmless error analysis based on the theory

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[5] Gray argues it is implicit from the result, reversal, that all three courts considered and rejected the applicability of harmless error analysis. But it can equally be inferred the courts found prejudicial error justifying reversal.

procedural errors at trial constituted denial of a fair trial, but "this theory appears to have been rejected by the United States Supreme Court in *Arizona v. Fulminante*," which contrasted mere trial errors, which are not reversible per se, with structural errors, which are reversible per se)]; cf. *People v. Cahill*, *supra*, 5 Cal.4th at pp. 500-502, 509 [overruling a long line of pre-*Fulminante* decisions—a "substantial number" of which, like *Rojas* and *Keller*, constituted "decisions in the 1960's"—that had applied a rule of automatic reversal to the erroneous admission of confessions but had not "suggest[ed] that the erroneous admission of a confession constituted a structural defect in the trial proceedings"].)

3. *The Trial Court's Error Was Harmless*

a. *The Watson standard of harmless error*

The failure to obtain and review a current probation report implicates only California statutory law, not a federal constitutional right. (*Dobbins*, *supra*, 127 Cal.App.4th at p. 182.) Our review is thus governed by the standard for harmless error articulated in *People v. Watson*, *supra*, 46 Cal.2d 818. (See *People v. Vasquez*, *supra*, 39 Cal.4th at p. 66 [prejudice from a state law error must be evaluated under the *Watson* harmless error standard].) Under *Watson* an error requires reversal "only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Watson*, at p. 836.) A defendant appealing an order or judgment has the burden of demonstrating not only error but also a reasonable probability of a more favorable result absent that error. (See, e.g., *People v. Hurtado*, *supra*, 28 Cal.4th at p. 1191 [*Watson* test of prejudice

requires "a defendant to show that without the error a more favorable outcome was reasonably probable"]; *Christ v. Schwartz* (2016) 2 Cal.App.5th 440, 447 ["[u]nder the *Watson* harmless error standard, it is the burden of appellants to show that it is reasonably probable that they would have received a more favorable result at trial had the error not occurred"].)

b. *Gray has failed to establish a reasonable probability of a more favorable outcome*

To demonstrate a reasonable probability of a more favorable outcome had a current probation report been ordered and reviewed, Gray must show it is reasonably probable the missing report would have led the court not to exercise its discretion to terminate probation and impose the previously stayed five-year state prison term. (See *People v. Catalan* (2014) 228 Cal.App.4th 173, 179 [court enjoys broad discretion in matters relating to modifying or revoking postconviction supervision].) Yet Gray's principal argument in this regard relates to the conflicting evidence presented at the combined probation termination hearing and preliminary hearing relating to the domestic violence charge, in particular Terri Pierce's belief that Gray was not the man in the black Mercedes with Borrow when it was parked outside her house, even though Borrow admitted he was. Gray asserts in his opening brief, "Given the unclear evidence as to the violation, there is a reasonable probability that, with a probation report, the superior court might have viewed the probation violation as insufficient to warrant termination. The court may have viewed the violation as sufficiently unclear that, given the other circumstances, reinstatement was warranted."

Notwithstanding this argument, Gray did not identify in the sentencing memorandum submitted for the July 26, 2017 probation termination hearing any information regarding his conduct while on probation between 2015 and 2017 that might have persuaded the court not to terminate probation, nor has he done so in his briefs in this court. The closest Gray comes to identifying favorable information is his suggestion a current probation report would have served (1) to verify the accuracy of the People's unsupported assertion in their sentencing memorandum that Gray had suffered another felony conviction while on probation in March 2016; and (2) assuming Gray indeed had a 2016 conviction, to resolve any questions arising from the conviction, such as why his probation had not been terminated at the time. Gray argues "[o]ne can speculate" why his probation had not been terminated in 2016, such as, possibly, circumstances mitigating the 2016 conviction, favorable conduct by Gray outweighing the negative impact of the conviction or just plain neglect by the prosecutor. However, the admittedly "speculative" nature of this analysis underscores Gray's failure to meet his burden of demonstrating it is reasonably probable a current probation report would have resulted in reinstatement of his probation.[6]

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[6] The record clearly shows the trial court did not consider the 2016 conviction identified by the People in their sentencing memorandum (for driving under the influence of alcohol and causing bodily injury to another person) as support for its decision. As discussed, the trial court stated it did not need anything for its termination decision other than the finding of a probation violation based on the incident of domestic violence.

In light of Gray's failure to proffer any information about his conduct while on probation in the drug case, it is significant that the same judge who approved the 2015 plea agreement and ordered probation also presided at the probation termination hearing. That judge had available the early disposition report from the probation department in 2015 and again in 2017, which provided information regarding Gray's background and his extensive criminal history, as well as detailed information about the violent nature of Gray's probation violation, including police reports. Absent the showing of positive on-probation conduct, Gray failed to satisfy his burden of establishing it is reasonably probable a result more favorable to him would have been reached in the absence of the trial court's error.

DISPOSITION

The order terminating probation and imposing the five-year state prison term is affirmed.

PERLUSS, P. J.

We concur:

SEGAL, J. WILEY, J.*

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