Filed 12/1/06 P. v. Barrios CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ADRIAN BARRIOS, Defendant and Appellant.	B189967 (Los Angeles County Super. Ct. No. VA092700)

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

Robert Derham, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lawrence M. Daniels and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

____

Adrian Barrios appeals from the judgment entered following his convictions by jury of two counts (counts 2 & 3) of criminal threats (Pen. Code, § 422) with court findings that he suffered a prior serious felony conviction (Pen. Code, § 667, subd. (a)(1)) and a prior felony conviction (Pen. Code, § 667, subd. (d)). The court sentenced him to prison for eight years eight months.

In this case, we conclude there was sufficient evidence to convince a rational trier of fact, beyond a reasonable doubt, that appellant committed the crimes of which he was convicted. Appellant claims he simply made an angry outburst and there was insufficient evidence that he intended his threats to be conveyed to the victims where, as here, his threats were conveyed through an intermediary.

However, appellant made the threats following his arrest after deputies found evidence he possessed drugs and/or was a drug dealer. He claimed the deputies did not know who they were "messing with" and he was "connected," and he threatened to "get" the victim deputies. Appellant provided unusually specific information about the personal lives of the victim deputies, and expressly told the intermediary that appellant's statements were threats. Moreover, the threats occurred against the backdrop of appellant's prearrest verbal abuse, and violent behavior, towards deputies.

We reject appellant's related claims that the trial court failed to state reasons for imposing the upper term on count 2, he was denied effective assistance of counsel as a result of his trial counsel's failure to object to the trial court's said failure, and imposition of the upper term violated his rights to a jury trial and proof beyond a reasonable doubt. Appellant waived the issue pertaining to the trial court's failure by failing to raise that issue below. Moreover, the trial court's failure was not prejudicial because there were ample aggravating factors available to the court. The record fails to demonstrate appellant's trial counsel provided constitutionally deficient representation by failing to object to the trial court's failure and, in any event, in light of the aggravating factors available, no prejudice resulted; therefore, appellant was not denied effective assistance of counsel. Finally, imposition of the upper term did not violate appellant's rights to a jury trial or proof beyond a reasonable doubt.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established as follows.

1. *Ramirez's Testimony*.

Los Angeles County Sheriff's Deputy Michael Ramirez testified that about 9:00 a.m. on November 30, 2005, Ramirez assisted deputies execute a search warrant at a residence located at 4222 Layman in Pico Rivera. Los Angeles County Sheriff's Detective Thomas Garcia was in charge of the execution of the warrant, and Los Angeles County Sheriff's Deputy Gilbert Dominguez assisted. At or about the time that Ramirez arrived, Los Angeles County Sheriff's Deputy Dorsey Berlinn, a female deputy in a canine unit, was there with her police dog.

Deputies entered the house, brought out appellant, and searched the house. Appellant sat on the porch with his two children for about 30 to 45 minutes while deputies searched the residence. At one point appellant complained about the cold, requested a blanket for the youngest child, and a deputy brought one about five minutes after appellant's request. Appellant's two children were adequately clothed.

During the period appellant was outside, Ramirez and appellant conversed. Ramirez testified appellant was "ranting and raving and going on back and forth, calling me a punk, calling me a fucking punk, *pocho*, which in Spanish it translates as a Mexican wanna-be white boy." Appellant was pointing at Ramirez and repeatedly telling appellant's daughters, "[s]ee that guy right there. He is a fucking punk." Appellant alternated between being calm and excited.

Deputies later took appellant into the house. They routinely did this after executing a warrant so that they could show the occupant that they had not ransacked the house. The deputies then took appellant, who was wearing only shorts, into a bedroom. The deputies removed appellant's handcuffs and asked to search the shorts he was wearing. Appellant became very angry, throwing his hands in the air. Ramirez testified that appellant told the deputies, "You guys are gay. You just want to see my stuff. You guys are fags." Appellant grabbed his shorts and pulled them down and up quickly,

exposing his genital area. Ramirez testified appellant then said, "[t]here, see, you guys got what you wanted to see."

Garcia told appellant that the deputies needed to check the area of appellant's buttocks. A short scuffle ensued. Ramirez's head was turned away before he saw the scuffle, but before he saw it he heard it, and he heard yelling. Ramirez testified he saw Garcia standing behind appellant, and Dominguez "next to him." Ramirez ran around and grabbed appellant's arm. Ramirez testified the deputies leaned appellant over his bed, which appellant was directly in front of, "and then it was over." Ramirez also testified that, after appellant was handcuffed, Garcia "grabbed [appellant's] shorts, pulled his waistband out and then that was it." Deputies escorted appellant to a patrol car. They also found narcotics in the house.

Ramirez transported appellant to jail. En route, appellant said, "That guy with the long hair, he's a pussy." Ramirez testified that Garcia had long hair when he searched the residence.

Ramirez also testified "[appellant] said the other punk, he drives a four-by-four. All I got to do is check the plates. [¶] And [appellant] also said the bitch with the dog I know where she runs. [¶] And before that [appellant] had said that: 'You don't know who you are messing with. I'm connected. I can take care of them all.'"

When appellant referred to the "other punk that drives a four-by-four," Ramirez thought appellant was talking about Dominguez, because Dominguez drove a four-by-four truck as his personal truck. Berlinn had been the only female deputy present during the search. When appellant referred to "that bitch," Ramirez connected that reference to Berlinn. Appellant said he knew "where she runs," and Ramirez knew that Berlinn ran in the area.

Ramirez asked appellant if he was making a threat. Ramirez, who had been a deputy for over ten years, testified as to why he had asked. Ramirez explained that people tell deputies "a lot of stuff and . . . you kind of know what's empty and what's not." The prosecutor asked what Ramirez meant and he replied, "You get people telling you I'll get you or . . . I'm going to get you, stuff like that. And [appellant] had specific

knowledge which struck me as kind of more than just an empty threat. He knew where deputy Berlinn ran. He knew specifics about Deputy Dominguez' truck. That struck me as a little more than just . . . your every day threat . . . ."

Ramirez testified he asked appellant if he was "threatening them" and appellant replied, "yeah, you know." Ramirez looked in his rear view mirror when appellant replied, and appellant nodded his head.

After Ramirez booked appellant, Ramirez found Garcia and Dominguez and relayed appellant's threats to them. Ramirez testified that the look on Dominguez's face "was kind of just almost blank . . . like an, oh, shit look." Ramirez had never contacted appellant before November 30, 2005.

During cross-examination, Ramirez indicated appellant said, inter alia, "'I'm connected'" and "'I know how to take care of you.'" Based on the personal information appellant possessed pertaining to the deputies, Ramirez took appellant's statements as a threat. When Ramirez asked appellant the follow-up question, "is that a threat[?]" it was not because Ramirez doubted that appellant had made a threat. Ramirez explained, "perception is everything. And if I perceive it to be something, I can't say that the next person is going to perceive that so I wanted to get the affirmative."

2. *Garcia's Testimony*.

Garcia testified as follows. Deputies entered the house and later a bedroom where they found appellant and two children. Deputies conducted a patdown search of appellant, who was wearing only shorts, then detained him in front of the house. Several other persons were detained. Deputies found narcotics in the garage of the residence and, using a police dog, deputies found plastic baggies in the bedroom where appellant appeared to have been living. Deputies later brought appellant to that bedroom to search the shorts he was wearing.

There were three deputies with appellant in the bedroom, and appellant called them "fags." Appellant said, "You guys are a bunch of faggots. You are not going to do that, you know. Fuck you." Appellant eventually exposed his groin area and Garcia told him that Garcia had to look at appellant's buttocks. Appellant refused and said, "Fuck

you. You are not going to do that." The deputies subdued and arrested appellant, and put him in a patrol car.

Garcia testified that, at the station, Ramirez told Garcia that appellant had made "some threats to us" and Ramirez "thought it was of concern because it was of a specific nature and the manner that he made these threats." Garcia testified, "[Appellant said] I know how to take care of him. That . . . bitch, referring to Detective Berlinn. I know where she runs. And . . . that other punk, I know he drives, I believe, a four by . . . truck of some sort. [¶] He said something to the point of . . . it only takes a license plate to know where these guys are. I am going to take care of you, of some sort." (*Sic*.)

Garcia made an effort to contact Berlinn about what appellant had said. Garcia made that effort immediately after appellant made the threats, which Garcia felt were credible. Garcia testified "I believed . . . in my heart that Detective Berlinn really needed to know about these threats because they seemed to be specific in nature as far as what he was telling . . . Ramirez at the time."

Garcia testified he called Berlinn and told her "this guy is making threats. He says he knows where you run." At the time, Berlinn was training to participate in a race. Berlinn normally did not run. Garcia testified that appellant's statement was very specific and it was odd that "someone would come up with saying something like that." Garcia told Berlinn what Ramirez had told Garcia.

Garcia told Berlinn that the threats were "above average," to watch her back, and the threats seemed credible. Garcia also told Berlinn the following. Berlinn had been at the location of the search, she normally parked in front of a location, appellant was outside at that time, and he saw her vehicle and knew its color. Appellant knew it was a canine unit, knew what Berlinn drove, knew where she was running, and knew she was a narcotics detective. Garcia testified that he had never known appellant before November 30, 2005. Garcia suggested to Berlinn that she change to a different vehicle than the one she drove on November 30, 2005.

3. *Dominguez's Testimony.*

Dominguez testified he had been a deputy for almost 12 years. Dominguez assisted Garcia in the execution of the warrant. After deputies searched the house, Dominguez, Garcia, and Ramirez tried to search appellant in his bedroom. Appellant became belligerent. Appellant was handcuffed and transported to the station.

Dominguez testified that, later at the station, Ramirez said that while he was transporting appellant, appellant made comments and threats towards Dominguez and Berlinn. Dominguez testified that the threats and comments were "that [appellant] knew what type of vehicle I drove and that he was connected and he could take care of us and that he would be able to take a license plate and find out where I lived." Dominguez testified he was shocked, surprised, and a little afraid.

Dominguez was afraid that appellant could find out where Dominguez lived, that appellant knew the type of vehicle Dominguez drove, and that appellant would possibly cause bodily injury or death to Dominguez or his family. When Dominguez heard that appellant would "take care of [Dominguez]," Dominguez took that to be a specific threat to cause bodily injury or death to Dominguez.

Dominguez drove a four-wheel-drive pickup truck, and Ramirez told Dominguez that appellant had said that appellant knew that Dominguez drove such a truck. Dominguez never met appellant before November 30, 2005. When Dominguez had been on patrol duty before his assignment to the narcotics bureau, he had driven a marked black and white patrol car. During his assignment with the narcotics bureau, Dominguez had never used his truck during the course of his duties. While he was assigned to narcotics, Dominguez's truck would be parked in the station parking lot, which was exposed to the public.

As a result of appellant's threats, Dominguez removed the license plate from his truck. He began taking different routes home, making sure no one followed him. Prior to appellant's threats, Dominguez only occasionally took a different route home. After appellant's threats, Dominguez sold the truck and bought a different vehicle, using a

confidential form that did not show his address. Dominguez had not used such a form in connection with the pickup truck.

Dominguez testified that when he had worked with inmates as a deputy, inmates would usually say "we know where you live or we can get to you or things like that. But they never gave specifics of type of vehicle I drove or anything like that." Appellant's threat affected Dominguez differently than any other. Dominguez was more afraid, and was afraid for his family. Dominguez and his family lived near Pico Rivera.

During cross-examination, Dominguez testified that one of the statements which Ramirez said appellant had made was "'I'll take care of them.'" Dominguez also testified that Ramirez told Dominguez that appellant said "I'm going to get them – I'll take of care of it, rather, and the guy with the four-by-four, I can check his plates, or something to that effect."

4. *Berlinn's Testimony.*

Berlinn testified that she was a canine handler and drove a van. On November 30, 2005, she was driving a county-issued turquoise van that contained her dog, and she received a request to assist in the execution of the warrant. When she later left the house, she noticed appellant sitting outside. Berlinn had no contact with appellant, but she did hear him make negative comments to another deputy. When Berlinn left the house, appellant gestured towards her. Berlinn testified that she heard appellant tell Ramirez "they're bad. That kind of gesture. [*Sic.*] That they are punks. . . . And basically that the cops that are here are bad, including myself." Berlinn later went to her van, which was parked less than a house away. Appellant was then facing the van.

After Berlinn left the location, Garcia spoke with her that day or the next and told her that appellant had made some type of threat against her. Garcia told Berlinn that appellant said he knew where she ran, what kind of van she drove and "he was going to get us. Something to that effect." After Berlinn heard this, she was concerned for her safety and also for her dog because Berlinn ran and appellant saw her van. Berlinn was surprised by appellant's comments because she had not interacted with him. She was concerned because she routinely drove the van home.

The following occurred during direct examination: "Q When you heard the defendant said he would get you, what did you take that to mean? [¶] A Whether it would be harm towards myself or my dog again or some type of retaliation if he did find out where I lived. [¶] Q And by 'retaliation,' . . . did you fear anything physical being done to you? [¶] A Sure. I mean it's a possibility. [¶] Q Did you fear that he might retaliate by trying to kill you? [¶] A That is also a possibility." As a result of what Garcia told Berlinn, she changed to a different van and used a different route to run. The place where she used to run was less than ten miles from Pico Rivera.

During the year before November 30, 2005, Berlinn had employed her dog at least twice in locations in Pico Rivera. When she drove her van to the Pico Rivera station, she would park it on the street. Before November 30, 2005, Berlinn had never taken precautions like changing her vehicle and exercise route as she did after she heard appellant's threats. Berlinn lived in Orange County.

During cross-examination, Berlinn testified she had been at the search location perhaps 20 minutes. She was the only female deputy there. Garcia told Berlinn that appellant commented to the effect, inter alia, "he would get them, he would take care of them." During redirect examination, Berlinn testified that plastic baggies such as those detected by the police dog were often used to package narcotics. Appellant presented no defense evidence.

CONTENTIONS

Appellant contends (1) insufficient evidence supported his convictions, (2) the court failed to state reasons for imposing the upper term on count 2, and (3) imposition of the upper term violated his rights to a jury trial and proof beyond a reasonable doubt.

DISCUSSION

1. *Sufficient Evidence Supported Appellant's Convictions.*

Appellant claims there was insufficient evidence supporting his convictions because he merely demonstrated an angry outburst and not an unequivocal and specific threat, and there was no evidence he intended the threats to be conveyed to Dominguez or Berlinn. We disagree.

Penal Code section 422, states, in relevant part, "[a]ny person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished . . . ."

In *People v. Toledo* (2001) 26 Cal.4th 221 (*Toledo*), our Supreme Court stated, "In order to prove a violation of [Penal Code] section 422, the prosecution must establish all of the following: (1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat -- which may be 'made verbally, in writing, or by means of an electronic communication device' -- was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances. [Citation.]" (*Id.* at pp. 227-228.)

As the court observed in the case of *In re Ryan D.* (2002) 100 Cal.App.4th 854 (*Ryan D.*), "the statute 'was not enacted to punish emotional outbursts, it targets only those who try to instill fear in others.' (*People v. Felix* (2001) 92 Cal.App.4th 905, 913.) In other words, [Penal Code] section 422 does not punish such things as 'mere angry utterances or ranting soliloquies, however violent.' (*People v. Teal* (1998) 61 Cal.App.4th 277, 281.)" (*Ryan D.*, *supra*, 100 Cal.App.4th at p. 861.)

Moreover, "the determination whether a defendant intended his words to be taken as a threat, and whether the words were sufficiently unequivocal, unconditional, immediate and specific [that] they conveyed to the victim an immediacy of purpose and immediate prospect of execution of the threat can be based on all the surrounding circumstances and not just on the words alone. The parties' history can also be considered as one of the relevant circumstances." (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340, bracketed material added.)

Further, as the court observed in *Ryan D.*, "Section 422 does not require that a threat be personally communicated to the victim by the person who makes the threat. (*In re David L.* (1991) 234 Cal.App.3d 1655, 1659.) . . . Accordingly, where the accused did not personally communicate a threat to the victim, it must be shown that he specifically intended that the threat be conveyed to the victim. (*People v. Felix*, *supra*, 92 Cal.App.4th at p. 913; *In re David L.*, *supra*, 234 Cal.App.3d at p. 1659.)" (*Ryan D.*, *supra*, 100 Cal.App.4th at p. 861.) "Where the threat is conveyed through a third party intermediary, the specific intent element of the statute is implicated. Thus, if the threatener intended the threat to be taken seriously by the victim, he must necessarily have intended it to be conveyed." (*In re David L.*, *supra*, 234 Cal.App.3d at p. 1659.)

In the present case, there is no dispute that appellant made a threat as that term is used in common parlance. Moreover, he was verbally abusive towards Ramirez while deputies searched the house, and appellant was later verbally abusive towards Berlinn.

Further, there was substantial evidence that drugs were found in the garage of the residence and/or in the residence itself where appellant lived, the dog alerted to plastic baggies in appellant's bedroom, and such baggies are often used to package narcotics. That is, there was evidence, albeit perhaps not proof beyond a reasonable doubt, that appellant was involved in narcotics possession and/or was a drug dealer.

It is common knowledge that narcotics and narcotics sales are frequently associated with criminal gangs or other criminal organizations, as well as with intimidation, violence, firearms, and shootings. (See *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1149, fn. 15; *People v. Glaser* (1995) 11 Cal.4th 354, 367; *People v.*

Montes (1999) 74 Cal.App.4th 1050, 1056; *People v. Atlas* (1998) 64 Cal.App.4th 523, 528.)

We note appellant apparently became violent with the deputies, not merely after they tried to search his person in the bedroom, but after the drugs and apparent drug paraphernalia were found. Appellant's verbal abuse towards Ramirez and Berlinn, the evidence that appellant was involved with narcotics and/or narcotics sales, and the violence demonstrated by him towards Garcia, Ramirez, and Dominguez was part of the historical backdrop of the threats that followed. Berlinn did not search appellant's person, but appellant knew she had participated in the search of the residence.

Later en route to the station, appellant told Ramirez that appellant was threatening Dominguez and Berlinn, among others; this provided evidence that appellant intended that his statements be taken as threats by, and conveyed to, Dominguez and Berlinn. Appellant not only made threats but warned Ramirez that he did not know who he was "messing with," appellant was "connected," and he would "get" and/or "take care of" Dominguez and Berlinn, among others. Under the circumstances, appellant's remarks reasonably could be interpreted to mean he was affiliated with a criminal gang or other criminal organization, and he could arrange retaliation. The specificity of the information appellant possessed concerning the vehicles Dominguez and Berlinn drove, and Berlinn's exercise regimen, dramatically increased the unequivocality, immediacy, and gravity of appellant's threats. Dominguez and Berlinn feared appellant would retaliate, causing bodily harm or death. As our Factual Summary reveals, both officers took long-term safety precautions. We conclude there was sufficient evidence to convince a rational trier of fact, beyond a reasonable doubt, that appellant committed a violation of Penal Code section 422. (*People v. Ochoa, supra*, 6 Cal.4th at p. 1206.)

2. *Imposition of the Upper Term Was Proper.*

Appellant presents related claims that the trial court failed to state reasons for imposing the upper term on count 2, he was denied effective assistance of counsel as a result of his trial counsel's failure to object to the trial court's said failure, and imposition

of the upper term violated his rights to a jury trial and proof beyond a reasonable doubt. We reject the claims.

a. *Pertinent Facts.*

Appellant was charged with three counts of criminal threats (counts 1 through 3) with Garcia, Dominguez, and Berlinn as the victims, respectively. The jury convicted appellant on counts 2 and 3. Count 1 had been dismissed pursuant to Penal Code section 995. The court found true the prior conviction allegations as previously indicated.

The probation report prepared for a March 2006 hearing reflects appellant was born in 1971 and had two aliases. In 1992, appellant suffered a conviction for second degree robbery armed with a firearm (case No. VA013172), and the court sentenced him to prison for three years. He was released on parole in 1993, but violated parole in 2001 and was returned to prison. In 2004, appellant was discharged from parole.

In March 2001, appellant was convicted of driving under the influence of alcohol or drugs. In 1995, appellant was arrested in Pico Rivera and, in that case (case No. VA089815), he was convicted in October 2005 of possessing a controlled substance. The court placed him on diversion. In January 2006, appellant was convicted of possessing marijuana while driving. Appellant told the probation officer that appellant had been using cocaine and methamphetamine for about a year.

Appellant also told the probation officer that, in the present case, he and other persons were renting a room in a house where, unbeknownst to him, drugs were being sold. According to appellant, police arrested him, no drugs were found, and police falsely claimed he threatened them. He went "verbally off" because of his concern for his daughters' health. The probation officer indicated appellant's prognosis appeared questionable.

The report listed as aggravating factors that (1) appellant's prior convictions as an adult or adjudications of commission of crimes as a juvenile were numerous or of increasing seriousness, (2) he had served a prior prison term, (3) he was on probation or parole when he committed the present offense, and (4) his prior performance on

probation or parole was unsatisfactory. The report indicated there were no mitigating factors.

The probation officer recommended that the court sentence appellant to prison, suspend execution thereof, and place him in a drug diversion program. However, the probation officer indicated that if the sentence was executed, aggravating factors outweighed any mitigating factor, "denoting high-base term." The probation officer also said that if enhancements were found true, they should be served consecutively to the base term. The People's sentencing memorandum filed March 16, 2006, listed as additional aggravating factors that appellant's crime involved the threat of great bodily harm, and the manner in which the crime was carried out indicated planning, sophistication, or professionalism.

During oral argument at sentencing on March 17, 2006, appellant expressly disputed the first aggravating factor listed in the probation report to the extent that factor referred to the increasing seriousness of his crimes, and expressly disputed the third aggravating factor to the extent that factor indicated he was on probation when he committed the present offense. Appellant asked that those factors be stricken so the court would not rely on them and so he would not later be deemed to have waived the issue of their inclusion in the report by failing to object to them. Appellant also disputed both previously mentioned aggravating factors listed in the People's sentencing memorandum. Appellant did not, during oral argument, expressly dispute as aggravating factors that appellant's prior convictions were numerous, he had served a prior prison term, or his performance on parole was unsatisfactory.

The court indicated it read the probation report and the parties' sentencing memoranda.[1] The court declined to rely on the alleged aggravating factor that appellant's prior convictions were of increasing seriousness. The court indicated it was "unclear" whether appellant was on probation when the present crimes were committed.

---

[1] Appellant's sentencing memorandum is not part of the record before this court.

Appellant requested the court to strike appellant's prior felony conviction under the Three Strikes law. The court noted several convictions suffered by appellant which were not listed in the probation report. In particular, appellant suffered a 1988 conviction for a violation of Vehicle Code section 10851. In June of an unspecified year, he suffered a conviction for driving with a suspended license. The court noted that sentencing was pending in that case. The court indicated that the prior conviction in case No. VA089815 was for a violation of Health and Safety Code section 11377. The court noted, in connection with appellant's robbery conviction in case No. VA013172, that on one occasion he failed to report after he was released on parole. The court, calling it a "very narrow call because he doesn't entirely deserve it," granted appellant's request to strike the prior felony conviction.

The court sentenced appellant to prison for a total of eight years eight months, consisting of the three-year upper term on count 2, with a consecutive subordinate term of eight months on count 3, plus five years pursuant to Penal Code section 667, subdivision (a). Appellant did not during oral argument expressly object to the imposition of the upper term.

b. *Analysis.*

Appellant claims the trial court erroneously failed to state reasons for imposing the upper term on count 2. However, appellant waived the issue by failing to raise it below. (Cf. *People v. Scott* (1994) 9 Cal.4th 335, 353; *People v. Brown* (2000) 83 Cal.App.4th 1037, 1041.) Notwithstanding appellant's suggestion to the contrary, his oral argument at sentencing was that certain alleged aggravating factors were inapplicable and certain should have been excluded from the probation report to preclude a later claim that he had waived the exclusion issue. He never objected during oral argument to the trial court's imposition of the upper term.

Moreover, appellant's prior convictions were numerous. (*People v. Searle* (1989) 213 Cal.App.3d 1091, 1098; Cal. Rules of Court, rule 4.421(b)(2).) He had served a prior prison term. (Cal. Rules of Court, rule 4.421(b)(3).) His performance on parole was unsatisfactory. (Cal. Rules of Court, rule 4.421(b)(5).)

The court read the probation report and the parties' sentencing memoranda, and heard argument of counsel. A single aggravating factor is sufficient to support imposition of an upper term. (*People* v. *Dreas* (1984) 153 Cal.App.3d 623, 636.) The court is deemed to have considered any factors in mitigation, and the court was not required to state its reasons for rejecting any mitigating factor. (Cf. *People v. Combs* (1986) 184 Cal.App.3d 508, 511; *People v. Regalado* (1980) 108 Cal.App.3d 531, 538). Accordingly, we conclude there is no need to remand for resentencing, since the alleged sentencing error was not prejudicial. (Cf. *People v. Steele* (2000) 83 Cal.App.4th 212, 226-227; *People* v. *Edwards* (1993) 13 Cal.App.4th 75, 80; see *People* v. *Avalos* (1984) 37 Cal.3d 216, 232-233.)

None of appellant's arguments compel a contrary conclusion, including his argument that the trial court's failure to state reasons for imposing the upper term prejudiced a claim that, under *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L. Ed. 2d 435], imposition of the upper term violated his right to a jury trial and proof beyond a reasonable doubt. No such violation occurred. (*People v. Black* (2005) 35 Cal.4th 1238, 1244, 1261; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Further, the record sheds no light on why appellant's trial counsel failed to object to the trial court's failure to state reasons for imposing the upper term, counsel was not asked for an explanation, and we cannot say there could have been no satisfactory explanation. Indeed, appellant's trial counsel reasonably may have failed to object because there were ample valid reasons supporting imposition of the upper term and/or counsel anticipated no more leniency from the court after it struck the prior felony conviction. As mentioned, no prejudice resulted from the trial court's failure. Therefore, appellant has failed to demonstrate he received constitutionally deficient representation or was prejudiced by any such representation, and we reject his claim that he was denied

effective assistance of counsel as a result of his trial counsel's above mentioned failure to object. (Cf. *People* v. *Ledesma* (1987) 43 Cal.3d 171, 216-217.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.