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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. BLAINE ALLEN EVANS, Defendant and Appellant.	A107822 (San Mateo County Super. Ct. No. SC056254)

Defendant Blaine Allen Evans was charged with receiving stolen property. (Pen. Code, § 496, subd. (a).) It further was alleged that defendant had suffered a prior felony that was a strike within the meaning of Penal Code section 1170.12, subdivision (c)(1), and five felonies for which he had received prison terms within the meaning of Penal Code section 667.5, subdivision (b). At defendant's request, the issues of his prior convictions, including the strike conviction, were tried to the court. The jury found defendant guilty of receiving stolen property. The court thereafter found all allegations of prior convictions and prison terms to be true, including the conviction charged as a strike. The court found no unusual circumstances justifying probation, and sentenced defendant to a term of five years in prison.

Defendant appeals.

FACTS

On the morning of April 19, 2004, Michael Brown returned to his job as a gate technician or service man, and discovered that someone had broken into the van he used for his job. A number of items were missing from the van, including a "Milwaukee drill." Police officer Michael Thompson investigated the crime, obtaining a full

description of the stolen items. A few hours later, Officer Thompson was dispatched to look into a verbal altercation that was taking place approximately one-half mile away from Brown's van. The altercation apparently had been between defendant—who was sitting in the passenger seat of a parked car, and a woman who was standing outside of the car, but was the car's owner.

After speaking with defendant for a few moments, Officer Thompson, with defendant's permission, searched defendant's person. Officer Thompson then, after receiving the woman's consent, searched her car. He found, among other things, a red toolbox. Defendant stated that the toolbox belonged to his grandmother. Officer Thompson thought defendant's statement was a little strange, and asked about it. Defendant confirmed that the toolbox belonged to his grandmother, stating that she had a lot of tools. Officer Thompson opened the toolbox, and immediately saw the word "Milwaukee" on a tool. It occurred to the officer that the tool might be the drill that had been stolen from Brown. He therefore detained defendant, and called Mr. Brown and his employer, Larry Rummel, asking them to come over and take a look at the tool. As they were waiting, defendant told Officer Thompson that he wanted to cooperate, that the tool wasn't his grandmother's and that he had bought it from a friend. He paid $40 for it, and wanted to make a profit by selling it for $80.

Mr. Brown and Mr. Rummel arrived. They identified the tool as the drill stolen from Mr. Brown's van. Officer Thompson arrested defendant. After the officer read defendant's *Miranda* rights to him (*Miranda v. Arizona* (1966) 384 U.S. 436), defendant told him that he had received a call about the drill that morning, from an acquaintance, Tony Roland. Defendant stated that he assumed that Mr. Roland had not purchased the drill. The officer said, "You are assuming he didn't buy it." Defendant replied, "Yeah, I'm assuming he didn't buy it if you know what I mean." Officer Thompson was not able to obtain any significant information from defendant about how to locate Tony Roland, why Roland might have thought defendant would want the drill or why defendant lied to the officer about the drill's ownership.

DISCUSSION

CALJIC No. 1.00

The evidence fully supported the jury's finding that defendant was guilty of receiving stolen property, defined as buying or receiving any property that has been stolen or obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained. (Pen. Code, § 496; see also *People v. Anderson* (1989) 210 Cal.App.3d 414, 421 [proof of knowing possession by a defendant of recently stolen property raises a strong inference that defendant knew of tainted nature of property, requiring only slight additional corroborating evidence to support a finding of guilt].)

Defendant does not attack the sufficiency of the evidence supporting the jury's verdict. He claims however, that the jury was misled by CALJIC No. 1.00, which, as relevant, tells the jury, "You must not be influenced by pity for or prejudice against a defendant. You must not be biased against a defendant because he has been arrested for this offense, charged with a crime, or brought to trial. None of these circumstances is evidence of guilt and you must not infer or assume from any or all of them that a defendant is more likely to be guilty than not guilty." Defendant contends that the instruction has a tendency to confuse the jury, asserting that it suggests the prosecution's burden is something less than proving guilt beyond a reasonable doubt.

The question on review is whether there is a reasonable likelihood that the jury misconstrued or misapplied the words of the instruction. (*People v. Dunkle* (2005) 36 Cal.4th 861, 899; *People v. Clair* (1992) 2 Cal.4th 629, 663.) In resolving this question, we apply the well-established rule that " 'the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' " (*People v. Wade* (1995) 39 Cal.App.4th 1487, 1491 (*Wade*).) The jury here was fully and completely instructed on the prosecution's burden to prove guilt beyond a reasonable doubt, and on the evidence that it was to consider in deciding whether the prosecution met this burden. In similar circumstances, the court in *Wade, supra,* held, "[T]he jury would not have construed [CALJIC No. 1.00] in the manner suggested by defendant. A reasonable juror would

understand this instruction as an advisement to disregard the facts that defendant had been arrested, charged, and brought to trial, and to presume the defendant innocent. 'Constitutional jurisprudence has long recognized [instruction on the presumption of innocence] as one way of impressing upon the jury the importance of the right to have one's guilt "determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial. . . ." [Citation.]' [Citation.]" (*Id.* at p. 1492.) Similarly, it was held in *People v. Crew* (2003) 31 Cal.4th 822 (*Crew*), that it was not reasonably likely the jury would have misconstrued or misapplied several instructions, including CALJIC No. 1.00, to mean the prosecution has any burden other than proof beyond a reasonable doubt, when the jury was repeatedly instructed on the proper burden of proof. (*Id.* at pp. 847-848.)

Defendant seeks to distinguish *Wade*, pointing out that the reasonable doubt instruction given there, unlike the revised version given here, included language requiring the jury to convict only if they " 'feel an abiding conviction to a moral certainty of the truth of the charge.' " (See *Wade, supra*, 39 Cal.App.4th at p. 1492.) The distinction has no effect on the reasoning in *Wade* or in *Crew, supra*, 31 Cal.4th 822, and does not affect our decision here.

As it is not reasonably likely that the jury misconstrued or misapplied CALJIC No. 1.00, we need not and do not consider whether defendant waived the right to claim instructional error.

Defendant's Right of Allocution

At the sentencing hearing, the court, in accordance with Penal Code section 1200, asked if there was any legal cause why sentence could not be pronounced. Defense counsel stated that there was no legal cause, but also presented defendant's argument that he should be given one more chance before being sentenced to prison. Counsel pointed out that defendant's probation officer recognized that defendant's extensive criminal history resulted, in large part, from defendant's problems with drugs. The probation officer, while noting that defendant had failed two prior placements in residential

programs, and while asserting that defendant's history indicated he would not be amenable to probation, also noted there was hope that Delancy Street could bring defendant around. The court then heard the prosecution's argument, after which it asked defense counsel if he wished to say anything else. Counsel pointed out a problem with the amount of restitution recommended by probation. After resolving that problem, the court stated, "With that, the matter's submitted, correct?" Counsel agreed.

The court then stated its reasons for finding no unusual circumstances justifying probation. It denied defendant's motion for probation, ruling that defendant be committed to the Department of Corrections. At that point, defendant asked if he could speak. The court replied that he could not. The court then sentenced defendant to a term of five years. Defendant contends that the court violated his constitutional and statutory right of allocution by refusing to allow him to speak.

At common law, the defendant in a felony case was entitled to address the court before judgment was pronounced. The purpose of this "right to allocution" "was to permit the assertion of one of the few grounds for avoiding or delaying execution: the defendant had received a pardon from the crown, was insane, was pregnant, was not the person convicted, or was entitled to claim 'benefit of clergy.' [Citations.]" (*In re Shannon B.* (1994) 22 Cal.App.4th 1235, 1240 (*Shannon*).) The Federal Rules of Criminal Procedure include a "right of allocution" that extends beyond the common law right, allowing the defendant a right to speak personally in his own behalf at sentencing. (Fed. Rules Crim. Proc., rule 32(i)(4)(A)(ii), 18 U.S.C.)[1] The court in *Green v. United States* (1961) 365 U.S. 301, 304 (*Green*) considered the scope of the federal rule, noting that major changes have evolved in criminal procedure since the common law right had been established; i.e., "the sharp decrease in the number of crimes which were punishable by death, the right of the defendant to testify on his own behalf, and the right to counsel." (*Ibid.*) The court nonetheless asserted that it saw "no reason why a procedural rule

[1] Federal Rules of Criminal Procedure, rule 32 (i)(4)(A)(ii) (18 U.S.C.) provides that before imposing sentence, the court must "address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence."

should be limited to the circumstances under which it arose if reasons for the right it protects remain. None of these modern innovations lessens the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation. The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." (*Ibid.*)

The federal rule has no application here, and California has its own procedural rule, set forth in Penal Code section 1200. Penal Code Section 1200 sets forth the procedure for arraignment for judgment, providing, "When the defendant appears for judgment he must be informed by the Court, or by the Clerk, under its direction, of the nature of the charge against him and of his plea, and the verdict, if any thereon, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him." Penal Code section 1201, echoing, in part, the common law rule, explains just what "legal cause" might be. "[The defendant] may show, for cause against the judgment: [¶] (a) That he or she is insane; . . . [¶] (b) That he or she has good cause to offer, either in arrest of judgment or for a new trial."

The situation in *People v. Cross* (1963) 213 Cal.App.2d 678 (*Cross*), is quite similar to the situation here. At the sentencing hearing in that case, as here, the court noted that it had read the probation report, and asked, in accordance with Penal Code section 1200, whether there was any legal cause why the sentence should not be pronounced. Defense counsel answered that there was no legal cause, after which he argued for leniency, and again agreed that there was no legal cause why judgment should not be pronounced. The court began to pronounce sentence. It was interrupted by counsel, who asked if he could make another remark. The court stated that he could not, and continued to pronounce sentence. Counsel then stated that he had intended to ask if the defendant could make a statement of his own prior to the entry of judgment, and also asserted that the probation report was not entirely accurate. (*Id*. at pp. 679-681.) On appeal, citing *Green, supra,* 365 U.S. 301, the defendant argued that his right to allocution had been violated. The court rejected the argument, holding that *Green* was concerned with the right to allocution required by Federal Rules of Criminal Procedure,

rule 32(a) (18 U.S.C.), and that no similar extension of the right to allocution had been found in California. It held that the California rule was satisfied because the defendant was represented by counsel and it was the function of counsel, rather than of the defendant himself, to address the court on the defendant's behalf. (*Cross, supra,* at pp. 681-682.) *Cross* was followed on this point by the court in *People v. Sanchez* (1977) 72 Cal.App.3d 356 (*Sanchez*), which again pointed out that the discussion in *Green* pertained to the rights provided under a "federal rule of criminal procedure, the text of which differs substantially from Penal Code section 1200." (*Id.* at p. 359.) Following *Cross, supra,* 213 Cal.App.2d 678, and *Sanchez, supra,* 72 Cal.App.3d 356, we find that the proceedings at issue here fully complied with California's statutory right to allocution.

We recognize that the court in *Shannon, supra,* 22 Cal.App.4th 1235, concluded that Penal Code section 1200 confers on defendants the right to make a personal statement and present information in mitigation of punishment. (*Id.* at p. 1246.) The court in *Shannon* noted that California's Penal Code was drawn from the 1850 Draft Code of Criminal Procedure of the State of New York. It found that New York in the 1850's recognized a right of allocution that included, at least in capital cases, the defendant's right to argue for leniency. The court reasoned that because the Draft New York Code allocution provisions were asserted to be " 'in conformity with the existing practice,' " "they must be viewed as fully encompassing, rather than restricting, the existing doctrine of allocution," and that the "code's specification of certain grounds for cause against pronouncement of judgment—insanity or cause in arrest of judgment or for a new trial—cannot properly be construed as prescribing the *only* matters that could be raised upon allocution." (*Id.* at pp. 1244-1245.) The court concluded that the Draft New York Code consequently "encompassed the more expansive 19th century version of allocution, which in turn is embraced by California's statutory right to allocution since it is based on the Draft New York Code." (*Id.* at pp. 1245-1246.) We respectfully

disagree.[2] Irrespective of whether the common law right of allocution included a right to make a statement in mitigation, the code provisions in question address quite a different matter—whether legal cause to pronounce judgment does or does not exist; i.e, whether there is some infirmity that makes pronouncement of judgment improper. We see no reason to construe the code provisions to include matters they clearly do not address. Defendant does not argue that legal cause to pronounce judgment was lacking.

Defendant contends, however, that even if Penal Code section 1200 conferred no right on him to make a personal statement in connection with sentencing, he has a due process right to allocution that was not addressed in *Cross, supra,* 213 Cal.App.2d 678, and *Sanchez, supra,* 72 Cal.App.3d 356. As discussed above, the United States Supreme Court has recognized a right of allocution in Federal Rules of Criminal Procedure, rule 32 (18 U.S.C.). (*Green, supra,* 365 U.S. at p. 304.) The Supreme Court also has concluded that a sentencing judge's failure to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed, although a violation of the federal rule, is not an error of constitutional dimension. (*Hill v. United States* (1962) 368 U.S. 424, 428 (*Hill*).) Defendant's argument arises from a question left open in *Hill*: whether due process is violated when the defendant requests, and is denied, the opportunity to speak. (*Id.* at p. 429; and see *McGautha v. California* (1971) 402 U.S. 183, 218-219, where the court pointed out that it had not directly determined whether, or to what extent, the concept of due process of law requires that a criminal defendant be permitted to present evidence or argument presumably relevant to the issues involved in sentencing.)

As defendant correctly asserts, the Ninth Circuit, in *Boardman v. Estelle* (9th Cir. 1992) 957 F.2d 1523 (*Boardman*), held that the right of allocution is constitutionally secured. The Ninth Circuit then ruled that a California court's refusal to allow the defendant to speak at a sentencing hearing therefore violated the defendant's constitutional rights. (*Id*. at p. 1530.) In the absence of clear direction from the United

[2] The Second District, in *People v. Ornelas* (2005) 134 Cal.App.4th 485, took note of *Shannon,* but did not analyze it, finding the defendant in the case before it was not prejudiced as a result of not being permitted to speak at sentencing. (*Id*. at pp. 487-488.)

States Supreme Court, we decline to adopt the Ninth Circuit's reasoning, or to find a constitutional due process right to allocution above and beyond the statutory right set forth in Penal Code section 1200. In any event, *Boardman* does not hold that a defendant's right of allocution requires the court to allow the defendant to speak after the court has begun to pronounce sentence. The court there refused a request to speak made before sentence was pronounced. (*Id*. at p. 1524.) Here, defendant did not seek to speak until after the court had begun to pronounce sentence. A judge may decide to allow a defendant to speak at this belated stage of the proceedings, but is under no legal requirement to do so. Finally, even under *Boardman,* reversal is not required if the error is harmless.[3] There is no suggestion here that there was an absence of legal cause why the judgment should not have been pronounced. As to grounds for leniency, the court here was well aware of defendant's character, issues and history. Defendant did not take advantage of the opportunity to submit a letter to the court through his probation officer, but both his mother and grandmother submitted letters, which the court read. Nothing in the record suggests that defendant had anything to add beyond the pleas of his relatives or the argument of his attorney. In short, even if defendant had either a constitutional or statutory right personally to argue on behalf of leniency, and even if that right was violated when the court refused to allow defendant to interrupt the court as it was pronouncing sentence, on this record, there is no likelihood whatsoever that defendant would have received a different sentence had he been permitted to speak.

[3] The Ninth Circuit was reviewing the dismissal of a petition for writ of habeas corpus, and found that it could not conclude on the record before it that the error was harmless. It remanded the matter so that the district court might take evidence on that issue. (*Boardman, supra*, 957 F.2d at p. 1530.) Such a procedure would not be appropriate here where the issue has been raised by an appeal from the judgment.

DISPOSITION

The judgment is affirmed.

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STEIN, J.

We concur:

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MARCHIANO, P. J.

_____
SWAGER, J.

Trial Court:	Superior Court of San Mateo County
Trial Judge:	Hon. Robert D. Foiles
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