

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ALFREDO ORNELAS,

Defendant and Appellant.

2d Crim. No. B181829
(Super. Ct. No. 1141507)
(Santa Barbara County)

Alfredo Ornelas appeals a judgment of conviction following his plea of nolo contendere to assault with a deadly weapon, with an admission that he committed the crime for the benefit of a criminal street gang. (Pen. Code, §§ 245, subd. (a)(1) & 186.22, subd. (b)(1).)¹ We affirm.

FACTS

On August 2, 2004, Ornelas drove several "Eastside" gang members to the Westside of Santa Barbara. Prior to leaving, Ornelas directed his passengers to leave their tire irons in the trunk of his Lincoln Towncar. When Ornelas drove by a market, he

¹ All statutory references are to the Penal Code.

saw Alejandro M. and Brian R., "Westside" gang members, standing in front of the market. He stopped his car, his passengers retrieved their tire irons, and a fight ensued. Another vehicle containing "Eastside" gang members also stopped and its occupants joined the fight.

Alejandro M. and Brian R. suffered serious and deep stab wounds inflicted by a passenger in the second vehicle. When police officers later found Ornelas's Towncar, they saw bloodstains on and inside the car. During an interview with police officers, Ornelas admitted "cruising" with three "Eastside" gang members and stated that a fight ensued when "Westside" gang members threw objects at his Towncar. Later, when interviewed by the probation officer, Ornelas stated that he "was hanging around with the wrong people."

On November 2, 2004, Ornelas pleaded nolo contendere to one count of assault with a deadly weapon, and he admitted committing the crime for the benefit of a criminal street gang. (§§ 245, subd. (a)(1) & 186.22, subd. (b)(1).) A plea agreement with the prosecutor provided for "a three-year prison lid," probation, or "any other combination." The trial court continued the sentencing hearing on three occasions.

On February 10, 2005, Ornelas and his attorney appeared for sentencing. The trial court informed Ornelas of the charges to which he had pleaded, but did not inquire "whether [Ornelas] ha[d] any legal cause to show why judgment should not be pronounced against him." (§ 1200.) The trial court sentenced Ornelas to a three-year midterm sentence for assault, and stayed the five-year term for the criminal street gang enhancement. Neither Ornelas nor his attorney objected to the sentencing procedure and neither requested to present mitigating evidence.

Ornelas appeals and contends that the trial court denied him his right to allocution.

DISCUSSION

Ornelas asserts that he has a statutory right to allocution pursuant to section 1200. (*In re Shannon B.* (1994) 22 Cal.App.4th 1235, 1238 [§ 1200 affords a defendant the right to make a personal statement on his own behalf and to present information in

mitigation of punishment].) He argues that he did not receive an opportunity to present evidence in favor of a grant of probation or a lesser sentence. Ornelas contends that the error is prejudicial because he would have obtained a more favorable result had he been apprised of allocution. (*People v. Skinner* (1966) 241 Cal.App.2d 752, 756-758 [collecting and discussing decisions].)

Section 1200 provides that when a defendant appears for judgment, he must be asked whether he has "any legal cause to show why judgment should not be pronounced against him." *In re Shannon B.*, *supra*, 22 Cal.App.4th 1235, 1246, concluded that section 1200 entitles a defendant to make a personal statement and present mitigating information at sentencing. "Whether to permit a defendant to speak personally before pronouncement of judgment is not . . . within the discretion of the court. [Citations omitted.] Rather, [section 1200] gives the defendant the right not only to assert insanity or grounds in arrest of judgment or for a new trial (Pen. Code, § 1201), but also the right to make a personal statement and present information in mitigation of punishment. [Footnote omitted.]" (*Ibid.*) Our Supreme Court has noted *In re Shannon B.*, *supra*, 22 Cal.App.4th 1235, but has concluded that "no court has held that in a noncapital case a trial court must, on its own initiative, *offer* the defendant allocution." (*People v. Lucero* (2000) 23 Cal.4th 692, 718.)

Decisions have determined that lack of compliance with section 1200 is harmless error when defendant is represented by counsel and has pleaded guilty. (*People v. Billetts* (1979) 89 Cal.App.3d 302, 310-311 [collecting and discussing decisions].) "Although the statute is couched in mandatory language, lack of compliance has been deemed fatal to the judgment on only rare occasions, in almost all of which defendant was without counsel. [Citations omitted]." (*Id.*, at p. 310.) Here Ornelas pleaded *nolo contendere* to assault with a deadly weapon, and he admitted the criminal street gang allegation. Counsel represented him throughout the proceedings, including sentencing. Indeed, immediately following the statement of sentence, Ornelas's attorney challenged the restitution amounts imposed by the court and requested either a hearing or documentation of the victims' medical expenses.

Ornelas and his attorney spoke with the probation officer and their statements are included in the probation report. Ornelas informed the probation officer that his girlfriend was pregnant, that he recently completed one semester at community college, and that he last consumed alcohol on the day of his arrest. He admitted to "previous association with the 'Eastside Treviesos,'" and that he "was hanging around with the wrong people." The probation report noted that Ornelas was on probation at the time of the offense. Ornelas's attorney informed the probation officer that he believed probation and one year's confinement in county jail was "appropriate."

Ornelas does not establish any prejudice arising from the trial court's omission. He was represented by counsel throughout the proceedings, and his mitigating information is set forth in the probation report. (*People v. Maese* (1980) 105 Cal.App.3d 710, 724 [§ 1200 error not prejudicial where defendant present and represented by counsel and no prejudice appears].)

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

Brian E. Hill, Judge

Superior Court County of Santa Barbara

Joseph D. Allen, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Joseph P. Lee, Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.