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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK PENOLI,

Defendant and Appellant.

A136132

(Lake County
Super. Ct. No. CR-928712)

Defendant Mark Penoli appeals from a final judgment after a no contest plea to one count of inflicting corporal injury on a spouse or cohabitant (Pen. Code, § 273.5, subd. (a)).¹ No finding of probable cause for the appeal was made by the trial court and no application of a finding was presented by defendant. Appellate counsel has reviewed the file in this case and determined there are no meritorious issues to raise on appeal. She has complied with the relevant case authorities. (*People v. Kelly* (2006) 40 Cal.4th 106; *People v. Wende* (1979) 25 Cal.3d 436.) Defendant was notified of his right to file a supplemental brief, and did not file such a brief. Upon independent review of the record, we conclude no arguable issues are presented for review, and affirm the judgment. However, we remand the case to the trial court to correct an error in the abstract of judgment.

¹ All further statutory references are to the Penal Code.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The facts in this case are based on the police report. Cynthia L., defendant's girlfriend, ended their relationship on January 19, 2012. On the night of January 21, 2012, she was awakened when he entered her residence without her permission. He pulled her out of bed by her hair while yelling at her and questioning her about where she had slept the previous night. He accused her of having slept with someone else. He grabbed her by the arm, leaving a visible mark on her right bicep. He then put his hand down her shirt, grabbing her right breast. This also left red scratch marks on the right side of her chest. He then put his hand down the front of her sweatpants and touched her vagina. She tried unsuccessfully to prevent him from doing this. He said that he was checking to see if she cleaned herself after being with someone else. As they struggled, she kicked him in the groin and was able to get out of the house and leave in her car.

On April 2, 2012, the district attorney filed a first amended felony complaint charging defendant with stalking (§ 646.9, subd. (a); Count One) with an allegation that he was previously convicted of a violation of section 422; residential burglary (§ 459; Count Two); sexual battery (§ 243.4, subd. (a); Count Three); two counts of inflicting corporal injury on a spouse or cohabitant (§ 273.5, subd. (a); Counts Four and Five); and one count of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1); Count Six). The prosecution further alleged that he had one prior strike conviction within the meaning of sections 1170.12, subdivisions (a) through (d), and 667, subdivision (b) through (i), and that he had served three prior prison terms within the meaning of section 667.5, subdivision (b).

On the same date, defendant entered a plea of no contest to Count Four and admitted one of the prior prison terms, exposing him to a total possible prison term of five years. All remaining counts, except Count Three were dismissed with a *Harvey*² waiver. Count Three was dismissed pursuant to the negotiated disposition in the interests of justice. On the change of plea form, he acknowledged his understanding that the trial

² *People v. Harvey* (1979) 25 Cal.3d 754.

court would not grant probation unless it found his was an unusual case where the interest of justice would be served.

On April 18, 2012, defendant filed a motion to withdraw his plea of no contest. He claimed his counsel had rendered ineffective assistance to him by exaggerating the likelihood that he would not obtain an acquittal at trial, and alleged he was not properly advised of his prospects and options. In a declaration filed May 18, 2012, defendant also claimed he was suffering from side effects of confusion or delirium from having taken a prescribed medication called Elavil prior to entering his plea.

On June 4, 2012, defendant withdrew his motion to withdraw the plea.

On July 9, 2012, the trial court denied defendant's request for probation and imposed the aggravated term of four years in state prison on Count Four, plus a one-year enhancement for the prior prison term. Additionally, the court imposed various fines and fees, and awarded him a total of 233 days of custody credits.

DISCUSSION

Because of defendant's plea of no contest, we do not review any issue concerning the question of guilt. (*People v. Hunter* (2002) 100 Cal.App.4th 37, 42.) Additionally, without a certificate of probable cause he is not entitled to review of the validity of his plea. (*People v. Johnson* (2009) 47 Cal.4th 668, 675; *People v. Brown* (2010) 181 Cal.App.4th 356, 360–361; *People v. Cole* (2001) 88 Cal.App.4th 850, 868.)

Upon review of the record, we discern no arguable issues. The record supports the conclusion that defendant was ably represented by counsel at all times during the proceedings. We find no error in the proceedings or in the sentence imposed. The trial court properly determined the validity of his plea, correctly awarded credits, imposed appropriate restitution fines, and generally exercised its discretion in a proper manner. The sentencing was in accord with the probation officer's report, which the court had read and considered. The aggravated term that was imposed, with the one-year enhancement, did not exceed the range discussed at the time the plea of no contest was entered. The court articulated its conclusions regarding the sentence at a hearing in which each side presented their arguments for a proposed sentence and each side was

fully heard by the judge. However, the abstract of judgment must be corrected as it does not accurately state the charge of which defendant was convicted.

DISPOSITION

The trial court is directed to prepare an amended abstract of judgment reflecting that defendant's conviction is for violation of section 273.5, subdivision (a), not for violation of section 245, subdivision (a)(1). The court shall forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

Dondero, J.

We concur:

Marchiano, P. J.

Banke, J.