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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL JOSEPH CHRISTOPHER,

Defendant and Appellant.

D059953

(Super. Ct. No. SCD231659)

APPEAL from a judgment of the Superior Court of San Diego County, Esteban Hernandez, Judge. Affirmed.

A jury convicted Paul Joseph Christopher of assault with intent to commit rape (Pen. Code,<sup>1</sup> § 220, subd. (a)(1)) and three counts of misdemeanor battery (§ 243.4, subd. (e)(1)). The jury found Christopher was armed with and used a deadly weapon during the assault (§ 12022.3, subs. (a) & (b)). Christopher admitted three probation denial prior convictions. (§ 1203, subd. (e).)

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

The trial court sentenced Christopher to a determinate term of 14 years, consisting of the middle term of four years for the assault plus 10 years for the weapon enhancement under section 12022.3, subdivision (a). The sentence for the armed enhancement charged under section 12022.3, subdivision (b) was stayed pursuant to section 654. Sentences for the misdemeanors were imposed as time served. The court also sentenced Christopher in three other cases in which his probation had been revoked. Those sentences were ordered to run concurrently with the 14-year term in the current case.

Christopher filed a timely notice of appeal.

Counsel has filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) and *Anders v. California* (1967) 386 U.S. 738 (*Anders*) raising possible, but not arguable issues. We offered Christopher the opportunity to file his own brief on appeal. Christopher asked for and received an extension of time. Christopher filed his brief after the extension of time had expired, however, the court accepted the brief and it is discussed below.

#### STATEMENT OF FACTS

In the early morning hours of December 31, 2010, R.D. was walking home from the bus stop after work. As she was walking Christopher approached her and spoke to her.

Christopher was carrying a bicycle and placed the wheel of the bicycle in R.D.'s path. He touched her hand and told her he wanted to have sex with her. He then

produced a knife and a condom. He pressed the knife against her and placed his hand on various parts of her body.

When Christopher pushed her against a wall, R.D. suggested that her house was nearby and they would be better there. Christopher then followed her to her house. She was able to distract Christopher and get into her house, lock the door and call police. Christopher then left.

Police arrested Christopher about a mile from R.D.'s house. He matched the description given by the victim. He acknowledged encountering the woman but said that he had just grabbed her and gave her a hug. Police did not find a knife or condom in Christopher's possession at the time of his arrest.

## DISCUSSION

As we have previously noted, appellate counsel has filed a brief indicating she is unable to identify any arguments for reversal and asks this court to review the record for error as mandated by *Wende, supra*, 25 Cal.3d 436. Pursuant to *Anders, supra*, 386 U.S. 738, the brief identifies the possible, but not arguable issues:

1. Whether the evidence was sufficient to support the true findings on the weapons enhancements;
2. Whether trial counsel was ineffective for failure to file a motion to suppress Christopher's "non-Mirandized" statements;<sup>2</sup>

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<sup>2</sup> *Miranda v. Arizona* (1966) 384 U.S. 436.

3. Whether the trial court abused its discretion in imposing the upper term for the weapons use enhancement;

4. Whether the trial court abused its discretion in failing to strike the weapons use enhancement under section 1385;

5. Whether the trial court erred in staying, rather than striking the armed enhancement; and

6. Whether the trial court erred in awarding credits on the probation revocation cases pursuant to section 2933.1.

In his supplemental letter brief, Christopher raises a number of issues, which we have reviewed in light of the record. We have concluded that none of the issues raised presents an arguable appellate issue. We will address each of his issues:

1. Whether the action of police in discarding a plastic bag denied Christopher a fair trial.

When Christopher was arrested and identified by the victim, police found he was in possession of two bags. They searched each bag and found no incriminating evidence. Some of the belongings were contained in a black plastic bag. Apparently the bag was discarded. No issue regarding the discarding of the bag was raised in the trial court. Nothing has been presented on appeal to indicate what, if any conceivable prejudice might arise from the loss of the bag. (*Arizona v Youngblood* (1988) 488 U.S. 51.) Accordingly, this contention does not present an arguable appellate issue.

2. Whether the trial court erred by omitting some wording from a jury instruction.

First, there was no objection in the trial court to the language of the jury instructions. Further, the instructions contained in CALCRIM No. 251, as given, directed the jury to the need for the union of act and required mental state. The instruction specifically set out the required specific counts which require particular mental states. The remainder of the jury instructions correctly defined the elements of each crime. In light of the record, this contention does not raise an arguable appellate issue.

3. Whether there was inadequacy of the factual account of the victim and the police regarding the facts of the offense.

Here Christopher merely points out inconsistencies between the testimony of the victim at the preliminary hearing and trial and those of a police officer. All of the inconsistencies were fully presented to the trial jury which found the defendant guilty. The fact Christopher can point to some inconsistent testimony does not raise an arguable issue as to the sufficiency of the evidence to support his conviction.

4. Whether the prosecutor used false testimony.

Christopher does not direct us to any evidence that the prosecutor used "false testimony" at trial. The fact of inconsistencies as between witnesses does not rise to an arguable appellate issue of a due process violation by the prosecutor. If there is any basis for such a claim it is not contained in the record on appeal. Thus any remedy Christopher might have would have to be by way of a habeas corpus petition filed in the trial court.

In short, we have considered all of Christopher's contentions raised in his supplemental brief, and we have not found any of them to raise an arguable appellate issue in light of the record before us.

We have reviewed the entire record in accordance with *Wende, supra*, 25 Cal.3d 436 and *Anders, supra*, 386 U.S. 738, and have not found any reasonably arguable appellate issues. Competent counsel has represented Christopher on appeal.

#### DISPOSITION

The judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

AARON, J.