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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERTO BALBUENA, JR.,

Defendant and Appellant.

E054589

(Super.Ct.No. RIF129521)

OPINION

APPEAL from the Superior Court of Riverside County. Richard Todd Fields,  
Judge. Affirmed.

Richard Jay Moller, under appointment by the Court of Appeal, for Defendant and  
Appellant.

No appearance for Plaintiff and Respondent.

## INTRODUCTION

On April 7, 2006, a felony complaint charged defendant and appellant Roberto Balbuena (defendant) with one count of rape of an intoxicated person under Penal Code<sup>1</sup> section 261, subdivision (a)(3).

On April 18, 2008, defendant pled guilty to one felony count of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator under section 261.5, subdivision (c). Defendant was placed on three years of formal probation on the condition that he serve 120 days in jail.

On January 28, 2010, defendant admitted a violation of probation, and he was reinstated on the condition that he serve an additional five days in jail.

On August 31, 2011, defendant moved to set aside his guilty plea and to dismiss the felony complaint under section 1203.4, subdivision (a). The prosecutor opposed the motion citing the following reasons: (1) defendant had violated his probation making him ineligible for relief; (2) the nature of the case; and (3) the number of penal violations.

On September 16, 2011, the trial court denied defendant's motion, finding that it was a matter of discretionary relief. The court found that defendant failed to complete probation, had a probation violation, was convicted of a new crime (possession of marijuana), and was also convicted of driving under the influence while on probation. Moreover, the court noted that the original charge was a "pretty serious matter." The

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

court also stated that defendant did not have “just one short period of aberrant behavior,” but had a string of other criminal charges dating from 1997 to 2003.

The trial court, however, granted defendant’s motion to dismiss two other cases, case Nos. RIF098758 and RIM490508, over the prosecutor’s objections; these matters have not been appealed.

On September 21, 2011, defendant timely filed a notice of appeal, challenging the denial of his motion to dismiss this case.

### **STATEMENT OF FACTS**

According to the complaint, defendant had sexual intercourse with an intoxicated person in June of 1995, and defendant’s identity was established on June 1, 2005, by DNA testing.

### **ANALYSIS**

After defendant appealed, and upon his request, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738 setting forth a statement of the case, a summary of the facts, and potential arguable issues, and requesting this court to undertake a review of the entire record.

We offered defendant an opportunity to file a personal supplemental brief, but he has not done so. Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have conducted an independent review of the record and find no arguable issues.

**DISPOSITION**

The judgment is affirmed.

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MCKINSTER  
J.

We concur:

RAMIREZ  
P.J.

RICHLI  
J.