

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

WILFREDO ORTIZ SAENZ,

Defendant and Appellant.

E058805

(Super.Ct.No. FWV1201778)

OPINION

APPEAL from the Superior Court of San Bernardino County. Stanford E.

Reichert, Judge. Affirmed.

Elizabeth Garfinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

A jury convicted defendant and appellant Wilfredo Ortiz Saenz of attempted

forcible rape (count 2; Pen. Code, §§ 664/261, subd. (a)(2).)¹ The court sentenced defendant to the midterm of three years' incarceration. After defendant's trial counsel filed the notice of appeal, this court appointed counsel to represent defendant. 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 [87 S.Ct. 1396, 18 L.Ed.2d 493], setting forth a statement of the case, a statement of the facts, and identifying four potentially arguable issues: 1) whether the trial court erred in refusing instruction on the defense of reasonable belief in consent in CALCRIM No. 1000; 2) whether the trial court erred in excluding evidence of the victim's prior shoplifting arrest for purposes of impeaching her testimony; 3) whether the trial court erred in requiring defense counsel to produce the entire transcript of a witness interview when counsel only sought to admit portions of the interview; and 4) whether the court erred in declining to grant defense counsel a continuance to obtain the transcript in its entirety. We affirm.

FACTUAL AND PROCEDURAL HISTORY

On July 22, 2012, when the victim was 18 years old, she left her home in Pomona sometime between 9:30 p.m. and 10:00 p.m. to walk to her boyfriend's house. The victim's boyfriend was not answering her phone calls and she was worried about him.

¹ All further statutory references are to the Penal Code unless otherwise indicated. The jury acquitted defendant of the charged count 1 offense of kidnapping to commit rape (§ 209, subd. (b)(1)). The jury deadlocked on the count 3 offense of false imprisonment by violence (§ 236). The court declared a mistrial and later dismissed the count 3 charge upon the People's motion.

She had left him numerous voicemails with no response. As she was walking, she saw a parked white truck from which defendant exited. Defendant approached her.

Defendant told her it was too late for her to be out on the street. He said he had two daughters her age and would not want them to be out on the street walking alone at night. Defendant offered the victim a ride; she twice refused. He asked if she wanted to borrow his phone. The victim told defendant her phone's battery was dead; defendant asked if she wanted to charge her phone in his car.

Defendant opened the passenger seat of his car door for the victim. She connected her phone to his car and then stood outside the car with the door open. Defendant sat inside in the driver's seat. Defendant told the victim it looked suspicious with her standing outside the door; he said he did not have a license and did not want to receive a citation. Defendant asked the victim to sit inside the car and close the door so as not to call attention to him.

The victim initially told him no, but relented and sat down inside the car. Defendant leaned over her and closed the car door. The victim used his phone to call her boyfriend approximately four or five times; he never answered. Defendant offered the victim a ride to her boyfriend's house again; she agreed. She gave defendant directions.

On the way, defendant told her he was hungry and asked if the victim was too. When she said she was, he suggested stopping at a nearby Jack-in-the-Box where he bought and paid for the food. She ate. Defendant thereafter asked the victim if she smoked. She interpreted his question as referring to marijuana. The victim told defendant she occasionally "smoked."

Defendant told the victim he was just about to pick up some marijuana from a friend's house. He asked if it was okay if he went there before taking the victim to her boyfriend's house. Defendant drove to a house around the corner from the Jack-in-the-Box where a man came to the window and handed defendant some marijuana. Defendant told the victim the marijuana was for her and put it in her hand; she put it in her purse.

Defendant then started driving in the opposite direction of the victim's boyfriend's house. Defendant said he had to go meet his sister who was looking for a young woman to help in her business. He asked the victim if she had a job; she responded she did not. Defendant then drove from Pomona into Ontario.

The victim started to believe her acceptance of defendant's offer of a ride was not such a good idea. She asked him to pull over. He pulled over into the parking lot of a strip club. The victim got out of the car and went inside the lobby of the strip club for about 10 to 15 minutes. Defendant waited for her. The victim decided she was being paranoid and got back into defendant's car.

Defendant was "acting just fidgety and paranoid and, [] talking louder and moving fast." He started driving toward Ontario again. Defendant told the victim his sister was actually a drug dealer who sold methamphetamine, has a lot of people working for her, and hurts people. He said they were going to go see her. As they pulled up to the front of a motel, defendant told the victim the people outside worked for his sister, were armed, and if the victim made any false movements, they would shoot her.

Defendant "said it's too late now. You can't even try to run away. You can't go anywhere. It's too late and you're here now and you have to listen to me. You can't

leave because they are going to shoot you” The victim became “scared out of [her] mind.” Defendant parked in the motel parking lot. He threatened the victim, so she got out of the car and did everything he told her to do. They walked to a motel room where he opened the door with a key, they went inside, and he closed and locked the door.

The victim removed some pepper spray she had in her purse and placed it in the waistline of her leggings. Defendant took away her purse with her cell phone inside. Defendant sat on the bed; the victim sat on the sofa. Defendant started smoking methamphetamine. He offered her some; she refused, so he blew some smoke in her face. He suggested she smoke some of the marijuana; she declined. The victim testified she was afraid to leave because “he had really convinced me that those people out there had guns and they were guarding the building.”

Defendant started yelling at her telling her, “It’s too late. You’re here and you can’t leave and we’re waiting for my sister to come so you better not be loud and you better not try anything because they are there. They are outside.” He told her he had a gun underneath the couch. Defendant said “[a]ll you have to do is pretend you’re my girlfriend”

Defendant pulled out some rope, grabbed the victim, put it in front of her face, and showed it to her. He told her he did not want to hurt her. Defendant told the victim “that his sister is going to come in any minute and that there is going to be two big [] guys with her and that they are going [to] rape [you].” She believed him; she was scared.

Defendant took his shirt off, came over, sat next to her on the sofa, and hugged her while she was crying. He said he was just trying to help her: “Just all you have to do is

pretend you're my girlfriend so that when my sister comes she thinks that you are[,] and then the [] guys, they are not going to do anything to you because they'll think you're my girlfriend."

The victim asked if defendant would let her leave. Defendant became frustrated and asked if she wanted to die: "I'm trying to help you out. You just need to follow my simple instructions and you can't even do that." A short while later, the victim heard gunshots. It made her "more scared and more sure that there were people with guns outside because there [were] gunshots and they were pretty loud and [defendant] even pointed them out. Like, I got scared and he's like see, you hear those gunshots, yeah, they're protecting the place"

Defendant told the victim he was gay "so it's okay if you pretend that I'm your girlfriend because I don't even like girls." He said "I can just hug you and nothing because I don't even like girls." Defendant told the victim to sit down on the bed with him. She walked over to the bed and sat on top of the blanket. Defendant walked over to the other side of the bed and got underneath the blanket.

Defendant began texting and told the victim his sister was "going to be here any minute. So when she walks in, it has to kind of look like you're my girlfriend or else they're going to rape you." She believed him. Defendant became angry and told the victim they would not believe she was his girlfriend if she was just sitting on the bed looking scared.

Defendant grabbed the victim's chest, pushed her down on the bed, and grabbed her arm. He became "super aggressive" and told her since she "didn't want to do it the

easy way This is what you wanted” Defendant held her roughly; she tried to get away; defendant slammed her down and laid on top of her.

The victim removed the pepper spray from her leggings and placed it inside her wig. Defendant took off the victim’s sweatshirt, slid down her tube top to her hips, and pulled off her shoes and leggings leaving her wearing only her bra and underpants.

Defendant slammed the victim down again, started touching her breasts, kissed her, took her bra off, and began rubbing his lips on her breasts. He licked one of her breasts. Defendant’s pants were unbuckled, unbuttoned, and sagging down. He moved his fingers underneath the victim’s underpants.

The victim removed her pepper spray and sprayed him. Defendant screamed; she kicked him off her. She ran to the motel door, but he blocked her. The victim then ran the opposite direction into the bathroom where she locked the door.

She grabbed her pepper spray and exited the bathroom. Defendant was holding a chair up as if to throw it at her. The victim smacked the chair away and sprayed defendant in the face with the pepper spray again. Defendant raised his fist to hit her, but his eyes were burning. He told her to get her stuff and get out. The victim put on her leggings, tube top, and shoes, grabbed her purse, and left.

The victim left her bra and sweatshirt in the motel room. She ran toward the back of the motel and through an alley where she grabbed her cell phone and called 911. The People played a recording of the 911 call to the jury. The victim informed the 911 operator she did not know where she was, a man had held her hostage, threatened her, and tried to rape her. She further told the operator she had pepper sprayed him, run away,

and was hiding between houses in an alley. The victim's cell phone battery died at the end of the call.

Sergeant Michael Caldera of the Ontario Police Department was dispatched to Holt and San Antonio Streets in Ontario on July 23, 2012, at 1:39 a.m. regarding a possible rape. He contacted the victim. Her pants were inside out. The victim was crying, scared, and nervous. She indicated someone had attempted to rape her in a motel room. The victim said she had pepper sprayed him because she refused to have sex with him. The victim reported she had left her bra and shirt inside the motel room. Caldera drove her back to the motel where the victim identified two rooms as the possible location where the crime had occurred.

Additional officers were dispatched to the motel. Over a public announcement system, an officer requested occupants of the rooms to come out. Defendant exited room 120. He had on pants, but no shirt. Defendant's face was red, mucous was coming from his nose, his eyes were very watery, and he was coughing. The symptoms he exhibited were consistent with someone who had been pepper sprayed. The victim identified defendant as her assailant.

Officers entered the room. They could smell recently deployed pepper spray inside that was so pungent it was difficult to breathe. Defendant exhibited symptoms of being under the influence of a stimulant. An officer transported defendant from the motel to the Ontario Police Department where he was searched. They found a plastic baggie on defendant's person containing a white powdery substance which tested positive for methamphetamine.

An officer collected the victim's shirt and bra from the bed inside the motel room. Another officer found rope inside defendant's car.

On March 18, 2013, prior to trial, the People disclosed that when the victim was 14 years old, she had been arrested by Montclair police for taking \$69 worth of property. The case was never prosecuted. It was settled out of court with the requirement the victim perform community service. The People moved to exclude evidence of the victim's arrest from trial. The court excluded the "evidence on the following grounds: The Court finds it's too remote in time to have any relevance. The Court also finds that the prejudicial effect outweighs its probative value and engaging in the examination of this petty theft at age 14 for the alleged victim in this matter [] requires an undue consumption of time."

Also on March 18, 2013, the People and defense counsel conducted an interview with the victim. Defense counsel indicated he intended to play portions of the interview during trial and asked if the court required a transcript of the interview. The court responded that it would. Defense counsel requested time to have the interview transcribed. The prosecutor noted the interview "was maybe two hours. I mean, I don't – there is no reason why they can't get it transcribed within the next couple of days." The court anticipated two days of jury voir dire was sufficient time in which to have the interview transcribed. The parties conducted jury voir dire on March 19, 20, and 21, 2013. The People delivered their opening statement after the noon recess on March 21, 2013.

On March 25, 2013, the People objected to introduction of the recording of the interview with the victim on grounds of hearsay, relevance, and the incompleteness of the transcript provided by defense counsel. The People noted the second part of the interview had not been included in the transcript. The court sustained the People's objection reasoning "[t]he Court's not going to allow any part of the tape to be played unless the entire transcript is available for purposes, [sic] so that's the Court's ruling." Defense counsel requested additional time to obtain a complete transcript. The court denied the request.

During trial, defense counsel referenced the interview numerous times during his cross-examination of the victim. Defense counsel asked if she wanted to read the transcript or hear the recording of the interview. Defense counsel read portions of the interview transcript into the record during cross-examination of the victim. The People once mentioned the interview during examination of the victim. Defense counsel referred to the interview during his closing argument.

During discussion of the proposed jury instructions, the People objected to inclusion of language regarding the defense of reasonable belief in consent in CALCRIM No. 1000.² Defense counsel argued "[t]here is a lot of circumstantial evidence in this case that [defendant] could actually and reasonably believe that [the victim] consented in

² That language reads, "The defendant is not guilty of rape if he actually and reasonably believed that the woman consented to the intercourse [and actually and reasonably believed that she consented throughout the act of intercourse]. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the woman consented. If the People have not met this burden, you must find the defendant not guilty."

this case.” The People replied that to support the instruction, “the defendant has to get up on the stand and say I actually believe that she was consenting and this was why.” The court declined to instruct the jury with the defense reasoning that “with the defendant not testifying that he actually believed [the victim consented], . . . there is no basis for the Court to give . . . that part of the instruction.” The court instructed the jury with CALCRIM No. 1000 without the language regarding the defense of reasonable belief in consent.

DISCUSSION

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 independently reviewed the record for potential error and find no arguable issues. (*People v. Williams* (1992) 4 Cal.4th 354, 358-359 [Instruction on defense of reasonable belief in consent required only where the defendant adduces substantial evidence of equivocal conduct of the victim to establish honest and reasonable, but mistaken belief of consent.]; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1523 [“[I]t is established that evidence of mere arrests is inadmissible because it is more prejudicial than probative. [Citations.]”]; *People v. Dyer* (1988) 45 Cal.3d 26, 48 [“The fact that unrelated offenses were charged [against victims], and later dismissed or reduced, was [] irrelevant to a determination of potential bias on the part of the witnesses.”]; Evid. Code, § 356 [“Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party”]; *People v. Pearson* (2013) 56 Cal.4th 393, 460 [The purpose of Evidence Code section 356 “is to

prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed.’ [Citations.]”]; *People v. D’Arcy* (2010) 48 Cal.4th 257, 287-288 [“‘A continuance in a criminal trial may only be granted for good cause. [Citation.] ‘‘The trial court’s denial of a motion for continuance is reviewed for abuse of discretion.’’ [Citation.]’’”).)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON

J.

We concur:

HOLLENHORST

Acting P. J.

McKINSTER

J.