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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

GILBERTO MARTINEZ RODRIGUEZ,

Defendant and Appellant.

F061204

(Super. Ct. No. F10400002)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. James R. Oppliger, Judge.

Sylvia Koryn, under appointment by the Court of Appeal, and Daniel Koryn, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Peter W. Thompson, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Gomes, Acting P.J., Kane, J., and Franson, J.

A jury convicted appellant, Gilberto Martinez Rodriguez, of false imprisonment (Pen. Code, § 236),¹ a lesser included offense of the kidnapping offense charged in count 1, inflicting corporal injury on a spouse or cohabitant (count 2/§ 273.5, subd. (a)), misdemeanor assault (§ 240), a lesser included offense of the assault with a deadly weapon offense charged in count 3, and assault with a deadly weapon (count 4/§ 245, subd. (a)(1)). The jury also found true a great bodily injury enhancement (§ 12022.7, subd. (e)) in count 2.

On appeal, Rodriguez contends: 1) the court erred in admitting one of his postarrest statements, and 2) the court erred by its failure to stay the term it imposed in count 4. We will find that Rodriguez's abstract of judgment does not accurately memorialize the judgment imposed and direct the trial court to issue a corrected abstract of judgment. In all other respects we affirm.

FACTS

On January 3, 2010, Rodriguez dropped off his children at the home of his ex-wife, Alicia Ramirez. When Rodriguez walked into Ramirez's bedroom and saw a man's shirt, he began asking her who it belonged to. After Rodriguez yelled at Ramirez and hit her several times, a man came out of the closet and ran out of the house. Rodriguez continued hitting Ramirez and threatened to kill her. He then kicked Ramirez, dragged her by the hair to his car, and drove to his house. Over the next several hours Rodriguez kicked Ramirez and hit her with his hands and a belt. Rodriguez also choked her with a cord and threatened to kill her.

At approximately 7:00 a.m. the next morning Ramirez was able to use a cell phone to call her cousin who called the Fresno County Sheriff's Department. Sheriff's deputies arrived at Rodriguez's house at approximately 8:06 a.m. Rodriguez fled out the back

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

door but was quickly apprehended. The assault resulted in Ramirez suffering abrasions to her face and neck, bruising on her entire body, and a fractured bone in her nose.

DISCUSSION

Admission of Rodriguez's Postarrest Statement

On January 4, 2010, at 10:25 a.m., Detectives Arthur Maldonado and David Lopez took Rodriguez into an interview room for questioning. However, after Detective Lopez read Rodriguez his *Miranda*² rights, Rodriguez refused to make a statement and the detectives terminated the interview. Detective Lopez then walked out of the room to turn off the audio/visual equipment. Less than one minute later, Rodriguez asked Detective Maldonado what would happen if someone did not show up to court. Maldonado responded that the district attorney still had the right to file charges with or without the victim's consent. Maldonado also responded that the victim had serious injuries, because Rodriguez asked him questions regarding what could happen if the victim did not show up. Rodriguez nodded his head up and down and said something to the effect of, "I messed up." With what he described as "a little pep talk," Maldonado replied, "We all make mistakes. Unfortunately, we have to suffer the consequences in regards to our mistakes." Rodriguez seemed disappointed and continued nodding his head up and down. Rodriguez stated that he preferred not to talk, after which Maldonado did not ask Rodriguez any questions or make any other comments.

Prior to the start of trial in this matter the prosecutor filed a motion seeking admission of Rodriguez's statement that he "messed up." On August 18, 2010, following a hearing on the motion during which Detective Maldonado testified to the facts set forth above, the court ruled the statement admissible.³

² *Miranda v. Arizona* (1966) 384 U.S. 436.

³ Rodriguez did not present any evidence at the hearing.

Rodriguez contends that the court erred by allowing the prosecutor to introduce his statement that he “messed up” because Detective Maldonado “dominated and controlled the course of the interrogation” and that by the time Rodriguez made his incriminating statement, the interrogation had become explicitly “aggressive, confrontational, and/or accusatory.” Rodriguez also contends that the statement that the victim suffered severe injuries was “clearly intended to elicit an incriminating admission” and “[i]t was highly accusatorial.” We will reject these contentions.

“The privilege against self-incrimination provided by the Fifth Amendment of the federal Constitution is protected in “inherently coercive” circumstances by the requirement that a suspect not be subjected to custodial interrogation unless he or she knowingly and intelligently has waived the right to remain silent, to the presence of an attorney, and, if indigent, to appointed counsel. [Citations.] “If a suspect indicates ‘in any manner and at any stage of the process,’ prior to or during questioning, that he or she wishes to consult with an attorney, the defendant may not be interrogated. [Citations.]” [Citation.]

“A suspect, having invoked these rights, is not subject to further interrogation by the police until counsel has been made available to him or her, unless the suspect personally “initiates further communication, exchanges, or conversations” with the authorities. [Citations.] If a suspect invokes these rights and the police, in the absence of any break in custody, initiate a meeting or conversation during which counsel is not present, the suspect’s statements are presumed to have been made involuntarily and are inadmissible as substantive evidence at trial, even in the event the suspect executes a waiver and despite the circumstance that the statements would be considered voluntary under traditional standards. [Citation.]’ [Citation.]” (*People v. Storm* (2002) 28 Cal.4th 1007, 1021-1022, fn. omitted.)

““Interrogation” consists of express questioning, or words or actions on the part of the police that “are reasonably likely to elicit an incriminating response from the suspect.” [Citations.] ‘Interrogation thus refers to questioning initiated by the police or its functional equivalent, not voluntary conversation. [Citation.] “Volunteered statements of any kind are not barred by the Fifth Amendment”’ [Citations.] Consequently, the police ‘may speak to a suspect in custody as long as the speech would not reasonably be construed as calling for an incriminating response.’

(*People v. Clark* (1993) 5 Cal.4th 950, 985.)” (*People v. Gamache* (2010) 48 Cal.4th 347, 387-388.)

“[I]f the defendant thereafter initiates a statement to police, ‘nothing in the Fifth and Fourteenth Amendments ... prohibit[s] the police from merely listening to his voluntary, volunteered statements and using them against him at the trial.’ [Citation.]” (*People v. Bradford* (1997) 14 Cal.4th 1005, 1034.)

Here, after Rodriguez invoked his *Miranda* rights and the detectives ceased interrogating him, Rodriguez asked Maldonado what would happen if the victim did not show up to trial. Maldonado answered that the prosecutor had the right to proceed with the case without the victim’s consent and that the victim suffered serious injuries. Maldonado’s comments were brief and responsive to Rodriguez’s question and not likely to elicit an incriminating response from Rodriguez. Further, the statement that the victim suffered severe injuries was an accurate statement of what happened to the victim and did not suggest that Rodriguez was responsible for the victim’s injuries. Rather, it merely indicated, in response to Rodriguez’s inquiry, that the district attorney was likely to prosecute the case even without the victim’s cooperation because of the seriousness of the case.

Moreover, according to Maldonado’s uncontradicted testimony, the detectives did not interrogate Rodriguez because he invoked his *Miranda* rights and declined to speak with them. Since the detectives did not interrogate Rodriguez, there is no merit to Rodriguez’s claims that Maldonado dominated and controlled an interrogation that had gotten aggressive, confrontational, and/or accusatory by the time he made his incriminatory statement. Accordingly, we conclude that the court did not err when it ruled that Rodriguez’s statement that he “messed up” was admissible.

The Term Imposed on Count 4

Rodriguez's abstract of judgment indicates the court imposed a concurrent three-year term on his assault conviction in count 4. Rodriguez contends that the court should have stayed the term it imposed on count 4 because he committed the underlying assault offense in that count as part of a continuous course of conduct whose goal was to punish Ramirez for seeing another man. Respondent contends that the court actually imposed a stayed term on count 4 and that the abstract should be corrected to accurately reflect the court's order as to that count. We agree with respondent.

On October 25, 2010, the court sentenced Rodriguez to an aggregate five-year term, the low term of two years on count 2, a three-year great bodily injury enhancement on that count, and to time served on counts 1 and 3. In sentencing Rodriguez on count 4, the court stated,

“On the 245(a), the court will sentence the defendant to the mid-term of three years. And then that's -- pursuant to -- are we going to run this concurrent pursuant to 654 on Count 4?”

“There's at least an argument that they're separate offenses, *but the court is going to find that they are connected in their commission and 654 is appropriate and run concurrent.*” (Italics added.)

It is clear from the foregoing quote that the court misspoke when it mentioned a concurrent term with respect to count 4 and that it actually imposed a stayed three-year term on that count.

“Courts may correct clerical errors at any time, and appellate courts ... that have properly assumed jurisdiction of cases have ordered correction of abstracts of judgment that did not accurately reflect the oral judgments of sentencing courts.’ [Citation.]” (*People v. High* (2004) 119 Cal.App.4th 1192, 1200.) Accordingly, we will direct the trial court to issue an amended abstract of judgment which shows that it imposed a stayed three-year term on count 4.

DISPOSITION

The trial court is directed to prepare an amended abstract of judgment that indicates that the court imposed a stayed three-year term on count 4 and to forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects the judgment is affirmed.