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

THE PEOPLE,

Plaintiff and Respondent,

v.

ROLANDO JARAMILLO,

Defendant and Appellant.

F062409

(Super. Ct. No. 09CM1206)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kings County. Robert S. Burns, Judge.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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* Before Cornell, Acting P.J., Detjen, J., and Franson, J.

STATEMENT OF THE CASE

On February 18, 2011, appellant, Rolando Jaramillo, was charged in a third amended information with kidnapping for rape in concert (Pen. Code, § 209, subd. (b)(1), count 1),¹ kidnapping (§ 207, subd. (a), count 2), and rape in concert (§ 264.1, count 3). Count 3 was alleged to have been committed under aggravating circumstances, within the meaning of section 667.61, subdivisions (a), (b), (d), and (e) because the defendant tied or bound the victim, kidnapped the victim, and/or committed great bodily injury on the victim. Victor Cordova Alatorre and Daniel Espinoza Zenteno were charged as codefendants.²

The court conducted hearings on December 16, 2010, and February 18, 2011, based on motions brought by Jaramillo pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). During the December 2010 hearing, Jaramillo complained that he was not guilty of the allegations, and his counsel, James Oliver, was not helping him “get rid” of the charges against him. Jaramillo wanted a new attorney. After the trial court established that Jaramillo had nothing else to add, the court noted that Oliver had substantial experience with criminal jury trials.

Oliver explained that he had gone over the case with Jaramillo. Jaramillo ultimately rejected an offer for a determinate sentence in exchange for testifying against Zenteno. Oliver was concerned and explained to Jaramillo that he had made a recorded statement that constituted a confession and would likely be convicted if he went to trial. Oliver told the court that Jaramillo now denied making a confession to the police. The court denied the *Marsden* motion.

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

² Counts 1 through 5 included a great bodily injury allegation as to codefendant Zenteno (§ 12022.7, subd. (a)). Zenteno was the alleged perpetrator of the rape and was charged with additional counts.

At the February 2011 hearing, Jaramillo asserted that he wanted a new attorney because Oliver had not told him anything and had not helped him. Jaramillo claimed that counsel repeatedly “denied testimonial evidence that ... would prove [his] innocence” and would not “put together a defense ... present[ing] the facts of [his] case.” Also, counsel had not shown Jaramillo the video.

Oliver responded he had presented to the prosecutor, on more than one occasion, that Jaramillo was not a direct participant in the rape of the victim and wanted the allegations dismissed. The prosecutor refused to do so because police interrogation of Jaramillo showed his culpability. Jaramillo was insisting that he was “told the answers to give to the questions.” Oliver represented that Jaramillo had been shown pictures depicting Jaramillo carrying the victim into the hotel room. He had not shown Jaramillo the video from the hotel because, until the hearing, Jaramillo had not indicated any interest in seeing the video itself. Oliver did not obtain an investigator because he could not talk to the codefendants as they were represented by counsel. Jaramillo assured him that the other two defendants would exonerate him when they testified at trial. Oliver tactically chose not to have the victim questioned by an investigator because he preferred to question the victim on cross-examination. For these reasons, Oliver did not find there was anything to investigate. Concerning the allegation that Oliver had not presented the facts of the case, Oliver pointed out that there was not a preliminary hearing and the facts would be presented at trial. Oliver told the court that Jaramillo would be pursuing a cultural defense.

The court found Oliver was properly representing Jaramillo, there had not been a breakdown in the relationship between counsel and Jaramillo that would preclude counsel from effectively continuing to represent Jaramillo, and denied the *Marsden* motion.

At the conclusion of a jury trial, Jaramillo was found guilty of counts 1 and 3 and the special allegations were found true. On May 3, 2011, Jaramillo was sentenced to

prison for 25 years to life on count 3. His sentence on count 1 was stayed pursuant to section 654.³ Jaramillo was ordered to pay a restitution fine of \$10,000 and direct victim restitution of \$1,995.29. On January 26, 2012, an amended abstract of judgment was filed with Kings County Superior Court adding one day of custody credit for total custody credits of 848 days. Jaramillo filed a timely notice of appeal. We review this case pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).

FACTS

In December 2008, F.D. was working in a gas station in Kings County where she met Zenteno. Later that month, the two began to date. In January 2009, Zenteno took F.D. to a hotel on Highway 41 in Kings County but she did not want to go into a room with him. Later that month, Zenteno took F.D. to a hotel in Fresno and Zenteno performed oral sex on F.D. Zenteno also rubbed his penis on the outside of F.D.'s vagina without penetrating it. Again, in January 2009, the two went to another hotel in Fresno and they massaged each other. Zenteno was upset because F.D. would not have sex with him.

F.D. told her mother that Zenteno wanted to marry her and F.D. was willing to marry Zenteno at this time. In early February 2009, Zenteno took F.D. back to the hotel on Highway 41. Zenteno began intercourse with F.D., penetrating her and causing bleeding. Zenteno told F.D. she was making him feel uncomfortable, "like if he was raping [her] at the time." This was the first time F.D. had had sexual intercourse.

³ The court pronounced his sentence as seven years to life on count 1. The court misspoke. Under section 209, subdivision (b)(1), a defendant's sentence is specified as life with the possibility of parole. The abstract of judgment does not set forth a sentence for count 1 and notes that the sentence was stayed pursuant to section 654. Thus, Jaramillo's sentence on count 1 is set by operation of law and the abstract of judgment does not require amendment.

Zenteno took F.D. to his brother's home. A woman there told F.D. she was Zenteno's wife and asked F.D. if she knew that Zenteno was married. The woman advised F.D. to have a lot of patience with Zenteno. On the way home, F.D. asked Zenteno why he lied to her. Zenteno told F.D. he was not living in the same residence as his wife. At that point, F.D. stopped seeing Zenteno, although the two still communicated occasionally by text message and by phone.

On April 1, 2009, F.D. was still working at the gas station. Her shift ended around 10:00 p.m. F.D. drove home, parked her car, and walked toward the entrance to her home. There was a man hiding, bent down near the tire of a car. F.D. did not know the man. She identified the man in court as codefendant Alatorre.

Alatorre stood up and grabbed F.D. by the face, placing the palm of his hand over her mouth. Alatorre told another man (Jaramillo) to grab F.D. by her feet. F.D. moved Alatorre's hand and yelled for help. Alatorre and Jaramillo lifted F.D. off the ground and placed her in a car. F.D. yelled for help and struggled to get free from them, but failed to get free. At some point, F.D. bit one of the men. The car was Zenteno's car and Zenteno was the driver. The other two men were in the back seat with F.D.

As Zenteno drove, Alatorre faced the back of the car and Jaramillo tied F.D.'s hands and feet. Jaramillo told F.D. not to say anything or he would hurt her. Zenteno told the men to cover her mouth. One of the two men in the back seat placed duct tape over F.D.'s mouth. Zenteno drove to the same hotel on Highway 41 that he had taken F.D. to in February 2009.

Alatorre and Jaramillo carried F.D. into a room and left her there still bound. Although she was still bound, Zenteno pulled down her underwear and put his finger into her vagina. F.D. kept telling Zenteno to stop. Zenteno kissed F.D. and then pushed his penis into F.D.'s vagina. At this time, F.D.'s hands were unbound and she tried to push Zenteno away. She also told Zenteno that he was hurting her. Zenteno continued raping

F.D. for some minutes. When Zenteno finished, F.D. was bleeding from her vagina. Zenteno drove F.D. home and she wrote down the license plate number of his car on her hand. F.D. placed her clothing into a plastic bag.

Zenteno went to F.D.'s home to talk to her on April 5, 2009. F.D.'s mother was present. Zenteno told F.D.'s mother to convince F.D. to marry him. Zenteno told F.D. he was in the process of divorcing his wife. F.D. then told her mother what had happened on April 1st. F.D.'s mother told her to call the police. F.D. contacted the police on April 6, 2009.

During a call to Zenteno, arranged by the police, Zenteno told F.D. that he paid Alatorre and Jaramillo a few hundred dollars for their services, but did not know them. Zenteno told F.D. he never wanted to hurt her and he felt guilty. When F.D. asked Zenteno why he had sex with her, Zenteno replied because F.D. permitted him to do so. Zenteno seemed to become suspicious about the call. Zenteno asked F.D. where she was, why she was asking questions, and told her to go ahead and lock him up.

The hotel video surveillance tape showed Zenteno renting a room on April 1, 2009, at 10:54 p.m. The video also depicted Alatorre and Jaramillo removing F.D. from Zenteno's vehicle, carrying her into the room, and immediately walking back outside. Alatorre moved Zenteno's vehicle into a parking stall and he and Jaramillo walked away. Alatorre looked at his arm where F.D. had bitten him earlier. Alatorre and Jaramillo entered a white truck and drove away. The video showed Zenteno leaving the hotel at 3:53 a.m. on April 2, 2009.

The white truck in the surveillance video was recognized by a hotel clerk who provided the police with the truck's license plate number. The truck was registered to a person in Stockton. An officer went to the Stockton address and saw shoestrings similar to those described by F.D. in the bed of the truck. Officers identified two individuals associated with an earlier traffic stop involving the pickup truck. When officers showed

the hotel clerk pictures of these two men, the clerk identified Alatorre. F.D. said that the picture of Alatorre looked like one of the men who kidnapped her, but she was not 100 percent certain.

Alatorre was arrested and cooperative during interrogation. Alatorre was shown pictures from the hotel video and identified himself, Jaramillo, and the vehicles in the parking lot. Jaramillo was then arrested.

Alatorre testified as a prosecution witness as part of a negotiated plea of eight years in prison. Alatorre corroborated F.D.'s account of the abduction, her kidnapping, and being left at the hotel with Zenteno. Alatorre was bitten by F.D. as he was placing her in the car. He was given \$150 by Zenteno to split with Jaramillo, and later Zenteno gave him another \$100. Zenteno told Alatorre that he wanted help taking the girl to clear things up and later get married. Alatorre was aware of a cultural practice in Mexico of kidnapping for marriage.

Jaramillo was arrested, given his *Miranda* rights, and agreed to talk to investigators.⁴ Alatorre offered Jaramillo "a quick \$100" to kidnap F.D. Jaramillo was told that the plan was for them to travel in two vehicles to F.D.'s home. Jaramillo agreed to drive one of the vehicles, but not to be involved with the crime.

Jaramillo admitted that they waited in the dark for F.D. to arrive home and the plan was to place her in Zenteno's car. F.D. fought back when Alatorre grabbed her. Because F.D. was screaming, Jaramillo grabbed her legs to help Alatorre get her into the car. Jaramillo also tied F.D.'s feet and placed duct tape over her mouth because she was kicking and screaming. Jaramillo talked about the cultural practice in Mexico of parents allowing, or forcing, a girl to marry a man after he had sex with her.

⁴ *Miranda v. Arizona* (1966) 384 U.S. 436.

Examination of F.D.'s clothing revealed blood stains on her underwear, pants, and sweater.⁵ A sexual assault examination of F.D. by a forensic nurse revealed tears, lacerations, and abnormal bleeding to F.D.'s upper vagina. The blood was not menstrual blood. F.D. had a bruise on her left upper arm. Part of F.D.'s hymen was missing. Blood was still coming out of F.D.'s vagina and injuries to her hymen and behind it were consistent with forcible penetration. The nurse could not finish the examination because she could not keep medical instruments inside F.D.'s vagina because it was too painful for her. F.D. was sent to emergency care for her bleeding. The nurse opined that F.D. was the victim of a forceful assault.

Zenteno presented evidence from a nurse practitioner who was qualified as an expert. The nurse practitioner also examined F.D. and observed no active bleeding inside F.D.'s vagina and no lacerations, though she did see evidence of old blood. The nurse practitioner did not prescribe F.D. any medication and did not observe anything that caused her concern. The nurse practitioner conceded that a photograph of F.D.'s vagina depicted interruptions in the vaginal lining, which could be lacerations.

Zenteno testified that he began dating F.D. and then began to have sexual relations. The two talked to F.D.'s mother, telling her that they wanted to get married. F.D. was afraid to tell her mother that she might be pregnant. Zenteno and F.D. kept having sexual relations, but when they did, F.D. would always bleed a lot. Zenteno stated that he had sexual intercourse with F.D. two or three times in December 2008, and continued having intercourse with her in January, February and March of 2009. The intention was for F.D. to become pregnant.

According to Zenteno, F.D. told him to steal her, tie her up, drag her, and to do whatever Zenteno needed because that was the only way F.D. would understand that

⁵ The examination apparently occurred five days after F.D. was raped.

Zenteno loved her. Zenteno told F.D. he could not steal her because he had an injury to his arm. Zenteno approached Alatorre and asked him to help him steal his girlfriend. Alatorre asked Zenteno if he could bring someone else to help him. When the three men went to take F.D., she was initially scared because she did not know the other two men. Zenteno insisted that he never kidnapped F.D. Zenteno was only following F.D.'s request that he steal her.

Once in the hotel room, F.D. took off Zenteno's shirt and gave him a massage like she always did. F.D. had already freed herself from the bindings on her hands and legs. The two caressed each other and disrobed. They kissed and had sexual intercourse. F.D. had her cell phone with her but never used it. They left the hotel so F.D. could go to work in the early morning. Zenteno and F.D. talked on the way back to her house, discussing their plans to travel to Las Vegas. According to Zenteno, F.D.'s mother later became very angry when she learned that F.D. might be pregnant.

APPELLATE COURT REVIEW

Jaramillo's appointed appellate counsel has filed an opening brief that summarizes the pertinent facts, raises no issues, and requests this court to review the record independently. (*Wende, supra*, 25 Cal.3d 436.) The opening brief also includes the declaration of appellate counsel indicating that Jaramillo was advised he could file his own brief with this court. By letter on February 3, 2012, we invited Jaramillo to submit additional briefing.

Jaramillo replied with a document making the following accusations: one of the members of the jury started to talk to a witness outside the court causing the judge to advise the jury that it should not talk to anyone; police officers said hello to members of the jury and talked with them inside the courtroom; the judge and Jaramillo's counsel never let him defend himself from all of the lies said about him; the victim sat with the public before court started to be sure that she recognized Jaramillo; the prosecutor was

making signs to the victim to say yes or no; a detective “violated procedure by saying” Jaramillo’s name; the detective did not read Jaramillo his rights prior to questioning him; the prosecutor talked about Jaramillo’s case ahead of time “and asked for me to be found guilty;” the prosecutor took Jaramillo out of jail where he was pressured to take a plea of eight years; the jury found Jaramillo guilty based on a bunch of lies and his trial attorney deceived him and never talked to him.

Jaramillo initially contends that a juror began to talk to a witness and the court and counsel advised the jury not to talk to anyone. Jaramillo fails to show prejudice from this alleged event. Furthermore, we presume jurors meticulously follow the court’s instructions and that they did so here. (*People v. Cruz* (2001) 93 Cal.App.4th 69, 73; *People v. McNear* (1961) 190 Cal.App.2d 541, 547.) Most of Jaramillo’s remaining contentions involve alleged conduct occurring outside the courtroom, or that was not recorded in the trial court transcript. Matters that lie outside the record are not subject to appellate review. (*In re Rogers* (1980) 28 Cal.3d 429, 437, fn. 6; *People v. Cooks* (1983) 141 Cal.App.3d 224, 310.)

Jaramillo’s final contention can be construed as a challenge to the adequacy of his trial counsel. The defendant has the burden of proving ineffective assistance of trial counsel. To prevail on a claim of ineffective assistance of trial counsel, the defendant must establish not only deficient performance, which is performance below an objective standard of reasonableness, but also prejudice. A court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. Tactical errors are generally not deemed reversible. Counsel’s decisionmaking is evaluated in the context of the available facts. To the extent the record fails to disclose why counsel acted or failed to act in the manner challenged, appellate courts will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or, unless there simply could be no satisfactory explanation. Prejudice must

be affirmatively proved. The record must affirmatively demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*People v. Maury* (2003) 30 Cal.4th 342, 389.) Attorneys are not expected to engage in tactics or to file motions which are futile. (*Id.* at p. 390; also see *People v. Mendoza* (2000) 24 Cal.4th 130, 166.)

Jaramillo's assertions regarding his trial counsel are based on facts and details outside of the record on appeal. Other than Jaramillo's unsubstantiated assertion that his trial counsel was ineffective, he has failed to affirmatively demonstrate any deficiency in his trial counsel's representation or any resulting prejudice in his trial.

After independent review of the record, we have concluded there are no reasonably arguable legal or factual issues.

DISPOSITION

The judgment is affirmed.