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

THE PEOPLE,

Plaintiff and Respondent,

v.

RENE GONZALEZ,

Defendant and Appellant

F070216

(Super. Ct. No. F13906674)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County. Arlan L. Harrell, Judge.

Lindsay Sweet, 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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Rene Gonzalez was convicted of two counts of willful infliction of corporal injury on the mother of his children, Lena Dias. With enhancements he was sentenced to a

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\* Before Levy, Acting P.J., Franson, J. and Peña, J.

seven-year prison term. His appellate attorney filed a brief indicating she failed to identify any arguable issues in the case. After a thorough review of the record, we agree and affirm the judgment. We remand the matter to the trial court to correct a clerical error on the sentencing minute order.

### **FACTUAL AND PROCEDURAL SUMMARY**

The second amended information charged Gonzalez with three counts of inflicting corporal injury to a child's parent. (Pen. Code, § 273.5, subd. (a).)<sup>1</sup> The second count alleged Gonzalez personally used a dangerous or deadly weapon within the meaning of section 12022, subdivision (b)(1). The information also alleged Gonzalez had incurred a prior conviction that constituted a strike within the meaning of section 667, subdivisions (b)-(i), had incurred two prior convictions that resulted in prison sentences within the meaning of section 667.5, and had incurred a prior conviction that constituted a serious felony conviction within the meaning of section 667, subdivision (a)(1).

Fresno Police Officer Jeremy Kuckenbaker responded to a report of a possible domestic disturbance. At the residence he encountered Gonzalez who appeared to be anxious to leave. Gonzalez told Kuckenbaker that Dias had left the premises.

Kuckenbaker then drove around the area looking for Dias, who he eventually found walking with two children near a supermarket. Dias had several observable bruises on her arms and legs, and scratches on her neck.

Dias testified she and Gonzalez had three children together, and were living together on the day in question. She had a vague recollection of speaking with a police officer on that day, and a vague recollection of arguing with Gonzalez. Dias claimed she could not remember if Gonzalez touched her. She also testified her memory was not refreshed after reading the statement she gave to Kuckenbaker. Dias admitted she had

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

numerous bruises on the day she talked to Kuckenbaker, but claimed she could not recall how she got the bruises, or what she told Kuckenbaker about the bruises.

On cross-examination Dias claimed her lack of memory was because she had been drinking on the day in question, and she had been drinking frequently during that time period. She reiterated she had no memory of how she was bruised. Dias also admitted four prior convictions for crimes of moral turpitude.

Kuckenbaker was recalled. He testified that Dias did not appear intoxicated on the day in question as he did not smell any alcoholic beverage, she was not stumbling, her eyes were not bloodshot, nor did she have slurred speech.

When Kuckenbaker contacted Dias at the supermarket, Dias admitted she had been assaulted by Gonzalez. Kuckenbaker took Dias back to her residence and she identified Gonzalez as the person who attacked her. Dias then explained how she incurred the various injuries. On that day, she had an argument with Gonzalez regarding his cell phone. Gonzalez struck her on the collar bone/chest area in an attempt to remove a gold chain Dias wore around her neck. Gonzalez was unsuccessful, but caused some scratches and a bruise on her chest.

Dias next explained that on the previous day she was arguing with Gonzalez about her vehicle and Gonzalez struck her several times with a large metal flashlight causing the bruises to her arms. Dias also told Kuckenbaker a week before Gonzalez had kicked her in the back of her leg causing another bruise. Kuckenbaker described Dias as upset and distraught when talking with him.

The prosecution called Bob Meade as an expert witness on intimate partner battering. Meade did not have any knowledge of the facts of the case, nor did he ever meet with either Gonzalez or Dias. He explained the cycle of battering, and how this cycle might affect the victim. The jury was instructed this testimony could only be used to help evaluate Dias's testimony.

The prosecution also played two phone calls made from the jail by Gonzalez to his sister. The general tenor of these conversations was an attempt by Gonzalez to confirm his sister had spoken with Dias about not incriminating Gonzalez at trial.

The jury found Gonzalez guilty of two counts of inflicting corporal injury resulting in a traumatic injury on the mother of his children, and guilty of one count of the lesser included offense of battery on the mother of his child (§ 243, subd. (e)(1)). The jury found the dangerous or deadly weapon enhancement not true.

Gonzalez admitted he suffered a prior conviction that constituted a strike pursuant to section 667, subdivisions (b)-(i), had suffered a prior serious felony conviction within the meaning of section 667, subdivision (a)(1), and had served two prior prison terms within the meaning of section 667.5, subdivision (b).

The trial court exercised its discretion to strike the prior conviction that constituted a strike within the meaning of section 667, subdivision (b)-(i). (§ 1385.) The prior serious felony admission was moot because Gonzalez was not convicted of a serious felony as defined by statute. The trial court imposed an aggravated term of four years for count two, imposed a consecutive term of one year for count three (one-third the midterm), and imposed two additional years for the two prior prison term enhancements, for a total prison term of seven years. The trial court imposed a sentence of time served for the misdemeanor battery count (count one).

## **DISCUSSION**

Appellate counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 asserting that after reviewing the record she could not identify any arguable issues. By letter dated March 26, 2015, we invited Gonzalez to identify any issues he wished this court to address. Gonzalez did not respond to our invitation.

After a thorough review of the record we agree with appellate counsel that there are no arguable issues in this case. The case was straightforward. Gonzalez did not dispute the injuries suffered by Dias, but argued he did not cause those injuries. It thus

became a credibility contest between Dias's statement to Kuckenbaker and Dias's trial testimony feigning memory loss of the events. The only disputed evidentiary issue was the testimony of the expert witness. However, considering Dias's testimony the trial court acted well within its discretion admitting the testimony to provide a possible explanation for Dias's claim of loss of memory. The argument was based on the facts, the instructions were not disputed, and the verdict indicated the jury thoroughly considered each charge. The trial court dismissed the prior strike conviction before sentencing Gonzalez, thus greatly reducing his sentence.

We did identify a mistake in the sentencing minute order. There are two versions of this minute order in the record, the original and a corrected minute order from this hearing. Both indicate the trial court denied the request to strike the prior strike conviction. The reporter's transcript, as well as all other documents in the clerk's transcript, confirm the request was granted. Accordingly, we will affirm the judgment and remand the matter to the trial court to correct this error in the minute order.

#### **DISPOSITION**

The judgment is affirmed. The matter is remanded to the trial court to correct the September 12, 2014, minute order from the sentencing hearing to reflect the trial court exercised its discretion in the interests of justice to strike the prior conviction which Gonzalez admitted constituted a strike within the meaning of section 667, subdivisions (b)-(i).