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

THE PEOPLE,

Plaintiff and Respondent,

v.

CHAD LAWRENCE RAJSKUP et al.,

Defendants and Appellants.

F070819

(Super. Ct. No. F14901352)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County. F. Brian Alvarez, Judge.

Sylvia W. Beckham, under appointment by the Court of Appeal, for Defendant and Appellant Chad Lawrence Rajskup.

Robert L. Angres, under appointment by the Court of Appeal, for Defendant and Appellant Alejandro Felix, Jr.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Ward A. Campbell, Deputy Attorneys General, for Plaintiff and Respondent.

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

Appellants Chad Lawrence Rajskup and Alejandro Felix, Jr., each pled no contest to two counts of forcible oral copulation in concert (Pen. Code, § 288a, subd. (d)(3)).<sup>1</sup> Felix's appellate counsel filed a brief that raises no issues and asks us to independently review the record in his case. Following independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436, we affirm the judgment as to Felix. Rajskup contends the court erred in imposing the middle term. We reject this contention and also affirm the judgment as to Rajskup.

### **FACTS**

In the early morning of February 6, 2014, the 17-year-old confidential victim (CV) contacted F.M. on Facebook and agreed to meet him. At approximately 2:08 a.m., F.M. picked up the CV and drove to a residence where they entered a detached garage where Rajskup, Felix, and Christian Lopez were present. Shortly after their arrival, Rajskup brought a bottle of vodka out from the main house and the CV drank some. When the other males finished the bottle, Rajskup brought another bottle of vodka from the main house and told the CV, "I bet you can't hang." The CV refused to drink anymore but when the group persisted, she took another drink. The CV became increasingly uncomfortable and asked to be taken home. Lopez then grabbed her jaw, forced her to open her mouth, and Rajskup poured vodka into it.

The CV got sick and vomited outside the garage. Afterwards, Rajskup and Lopez took her to a bathroom in the house and fondled her over and under her clothing as she cleaned up. Rajskup and Lopez pushed the CV into a dark room where they continued to fondle her despite her protestations. Rajskup and Lopez then took the CV back to the garage, pushed her onto a bed in a separate room, and turned off the lights. As Rajskup

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

held the CV down, Lopez took off her jeans and underwear and they both sexually assaulted her. Rajskup also threatened to put a gun to the CV's head if she did not cooperate.

F.M. and Felix soon entered the room and all four males continued sexually assaulting the CV. Eventually the assaults stopped and the four males left the room. However, the males soon returned and took the CV to the house where one of them ordered her to get on her knees and told her that they were going to put a gun to her head. The CV thought she was going to be killed, but after some discussion, she was placed in a truck and driven to a location where she was let go. The CV then flagged down a passerby and called police. Police arrested F.M. and Rajskup on February 7, 2014. The following day they arrested Lopez and Felix. Lopez videotaped parts of the assault.

On February 11, 2014, the district attorney filed a complaint charging the four males with several charges. In pertinent part, the complaint charged Rajskup with rape by a foreign object acting in concert (count 1/§ 289, subd. (a)), and two counts each of forcible oral copulation in concert with a minor (counts 2 & 3) and forcible rape in concert (counts 4 & 5/§ 264.1). The complaint charged Felix with two counts of forcible rape in concert (counts 4 & 5).

On September 29, 2014, Rajskup pled no contest to counts 2 and 3 in exchange for the dismissal of the remaining counts and a lid of 10 years. After counts 2 and 3 were amended to charge Felix with forcible oral copulation of a minor in concert, Felix pled no contest to those two counts in exchange for a stipulated prison term of eight years and the dismissal of counts 4 and 5 against him.

On November 17, 2014, the court sentenced Felix to the stipulated term of eight years and Rajskup to the middle term of 10 years. During the sentencing hearing, Rajskup's defense counsel argued that although early on Rajskup occupied a position of leadership, it was F.M. who initiated contact with the victim and delivered her to the garage where she was assaulted. He also argued that only one aggravating circumstance

applied to Rajskup, i.e., that concurrent sentences were being imposed even though consecutive sentences could have been imposed. He also argued that the violence involved in the crime was not an appropriate aggravating factor because it did not involve greater violence than most crimes of that type. Rajskup's defense counsel further argued that dismissed counts could not be considered as aggravating circumstances but he conceded that facts arising from the dismissed counts could be used to "generate aggravation." As factors in mitigation, defense counsel noted that Rajskup voluntarily acknowledged wrongdoing at an early stage, he had a minor criminal record, and his prior performance on probation was satisfactory.

In arguing for a 10-year term, the prosecutor noted that Rajskup was involved in everything that happened to the CV at the residence by either personally perpetrating the acts against her or being present while others did. This, he argued, set Rajskup apart from F.M. and Felix, who each received the mitigated term of eight years. The prosecutor also argued that the degree of Rajskup's involvement in the assaults and the callousness and viciousness of the crimes outweighed the mitigating factor that he had a minor record.

The probation officer noted that it was Rajskup who poured vodka into the victim's mouth and argued that the case involved great violence, great bodily injury, and a high degree of viciousness.

The court asked defense counsel if he had any response and counsel submitted the matter.

The court prefaced its decision by stating that it watched the video recorded by Lopez and that even though the video did not fully reflect the complete ordeal the CV endured, the court was shocked and alarmed by what it saw. Thus, in imposing the middle term the court stated:

"The Court did have an opportunity to view Mr. Rajskup's involvement and there is some notion [in letters to the court] that he is a

follower and he may have some issues with regards to being exposed in utero to alcohol or cocaine and I'm aware that that may be the case. And it may make him more malleable, according to these letters, to be a follower. But what I saw in that video leads me to believe that he was not being led around, *but he was actually an active participant fully involved in taking somewhat of a leadership role.* And so that leads me to believe that his level of culpability is different.

"I'm cognizant of the fact that he has a limited criminal history, I've considered that. I'm cognizant of the fact that he appears to have done well on probation, I've considered that too. I'm cognizant of the fact that he acknowledged culpability early in the proceedings. I'm also cognizant of the fact of what he did here. *And I'm also cognizant of the fact that he was -- from the beginning to the end, appeared to be an active participant, readily making himself involved in the outrage that occurred to this victim. He was a major participant, a major instigator of the crimes, took an active role and he was there for all aspects of the offenses.*

"So the Court, for that reason, chooses the middle term to be the appropriate term for him as to Count Two and orders then as to Count Two, that he receive the 10-year term as the middle term in state prison. The Court also would order the middle term for Count Three, but order that that term be stayed pursuant to Penal Code Section 654." (Italics added.)

## **DISCUSSION**

### ***Appellant Rajskup***

Rajskup contends that his leadership role, his full and active participation in the sexual assault of the CV, and his constant presence during the victim's ordeal were circumstances inherent in the offenses that he and his cohorts committed in concert. Therefore, according to Rajskup, because these circumstances did not make his offenses distinctly worse than the ordinary, the court abused its discretion when it selected the middle term based on aggravating circumstances that do not support that term. Respondent contends Rajskup forfeited his challenge to the reasons the court relied on to impose the middle term by his failure to object and that, in any event, there is no merit to Rajskup's contention. We agree with respondent.

"A defendant, or his or her counsel, must object at the time of sentencing if the trial court does not state any reasons or a sufficient

number of reasons for a sentencing choice or double-counts a particular sentencing factor, and, if there is no objection, any error is deemed waived and cannot be challenged for the first time on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 353, 356, ... (*Scott*.) *Scott* stated: ‘We conclude that the waiver doctrine should apply to claims involving the trial court’s failure to properly make or articulate its discretionary sentencing choices. Included in this category are cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons.’” (*People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1371.)

Rajskup concedes he did not object to the court considering his leadership role, his full and active participation in the offenses, and his constant presence during the CV’s ordeal to impose the middle term. However, he contends he did not forfeit his challenge to this term because the court did not issue a tentative decision or disclose the basis for its decision until after the matter was submitted and this did not provide him with a meaningful opportunity to object. We disagree.

“‘[T]he parties are given an adequate opportunity to seek ... clarifications or changes if, at *any time* during the sentencing hearing, the trial court describes the sentence it intends to impose and the reasons for the sentence, and the court thereafter considers the objections of the parties before the actual sentencing.’ [Citation.] ‘The court need not expressly describe its proposed sentence as “tentative” so long as it demonstrates a willingness to consider such objections.... [¶] It is only if the trial court fails to give the parties any meaningful opportunity to object that the *Scott* rule becomes inapplicable.’ [Citation.] ‘In the rare instance where the actual sentence is unexpected, unusual, or particularly complex, the parties can ask the trial court for a brief continuance to research whether an objection is warranted, or for permission to submit written objections within a specified number of days after the sentencing hearing.’” (*People v. Boyce* (2014) 59 Cal.4th 672, 731.)

The prosecutor’s argument that Rajskup’s presence during all the offenses and the degree of his involvement merited the middle term should have alerted defense counsel that the court might rely on these circumstances to impose the middle term. Further, defense counsel’s concession during argument that “[i]t could be argued that early on Mr.

Rajskup occupied a position of leadership,” demonstrated he was aware the court might rely on his leadership role in the offenses to find an aggravating circumstance. Thus, defense counsel was on notice that the court might rely on this circumstance in selecting the appropriate term.

Additionally, although the court did not provide a tentative decision, after it pronounced Rajskup’s sentence, the probation officer asked the court if it had ordered Rajskup be tested for the AIDS antibodies pursuant to section 1202.1. The court replied that it had. Defense counsel then stated that he did not hear the last remark and the court reiterated that it had ordered the test. Although, the court did not invite objections from counsel, the court did not abruptly end the sentencing hearing and there is no indication in the record the court would not have considered objections to the sentence had they been raised at that point. This is not a case like *People v. Superior Court (Dorsey)* (1996) 50 Cal.App.4th 1216, which *People v. Gonzalez* (2003) 31 Cal.4th 745 (*Gonzalez*) cited as an example of a case where the trial court failed to give defense counsel a meaningful opportunity to object and where the court immediately declared a recess after placing the defendant on probation without hearing from either party. (*Gonzalez, supra*, 31 Cal.4th at p. 752.) Since the court here gave the parties an opportunity to speak following pronouncement of sentence, it provided them with a meaningful opportunity to object. Thus, the *Scott* forfeiture rule is applicable here.<sup>2</sup> However, even if Rajskup’s contentions were properly before us, we would reject them.

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<sup>2</sup> Alternatively, Rajskup contends he was denied the effective assistance of counsel by his counsel’s failure to object to the court considering these circumstances. A defendant claiming ineffective assistance of counsel under the federal or state Constitution must show both deficient performance under an objective standard of professional reasonableness and prejudice under a test of reasonable probability of a different outcome. (*People v. Osband* (1996) 13 Cal.4th 622, 664.) Rajskup, however, cannot show prejudice because, as discussed, *post*, there is no merit to his claim that the court relied on improper factors to impose the middle term. Thus, we also reject Rajskup’s ineffective assistance of counsel claim.

“‘A fact that is an element of the crime shall not be used to impose the upper term.’ However, where the facts surrounding the charged offense exceed the minimum necessary to establish the elements of the crime, the trial court can use such evidence to aggravate the sentence.” (*People v. Castorena* (1996) 51 Cal.App.4th 558, 562.) “The essence of ‘aggravation’ relates to the effect of a particular fact in making the offense distinctively worse than the ordinary.” (*People v. Moreno* (1982) 128 Cal.App.3d 103, 110.)

The court imposed the middle term, in part, because of Rajskup’s leadership role in the assault of the CV. A defendant’s leadership role in an offense is a proper aggravating circumstance (Cal. Rules of Court, rule 4.421(4)) that is not inherent in the forcible oral copulation in concert offenses Rajskup pled to. It is also a circumstance that is amply supported by the record and made his offenses “distinctively worse than the ordinary.”

Further, Rajskup’s involvement in the assault of the CV far exceeded the minimum conduct necessary to establish the elements of the two forcible oral copulation in concert offenses he pled to. Rajskup was primarily responsible for getting the CV intoxicated to facilitate the assault by bringing the vodka into the garage and pouring it in her mouth. He was also present and actively aided all of his codefendants when they committed numerous other forcible sex acts against the victim and he participated in additional sex acts to which he did not plead. A defendant who personally perpetrates and/or aids and abets other defendants in perpetrating numerous forcible sex offenses in concert against a victim beyond those that he pled to, is more culpable than one who commits only two acts of forcible oral copulation in concert against the victim. Thus, the court properly found aggravating circumstances based on Rajskup being a “major

participant [and] a major instigator of the crimes,” his active role in all the offenses against the victim, and his presence during “all aspects of the offenses.”

Rajskup’s reliance on *People v. Young* (1983) 146 Cal.App.3d 729 to argue otherwise is unavailing. In *Young*, this court found it error for the trial court to rely on the ““extreme serious nature of the offense”” to aggravate the defendant’s assault with a firearm conviction. In so finding, we stated: “To say an assault with a deadly weapon is an extremely serious offense merely states the obvious and does not have an effect of making the offense distinctly worse.” (*Id.* at p. 734.)

*Young* is inapposite because here, the factors relied on by the trial court to impose the middle term were not inherent in the commission of the underlying offenses, the factors did more than just state the obvious, and these factors unquestionably made Rajskup’s two forcible oral copulation offenses in concert offenses distinctively worse than the ordinary. Thus, we conclude that the court did not abuse its discretion when it sentenced Rajskup to the middle term.

### ***Appellant Felix***

Felix’s appellate counsel has filed a brief which summarizes the facts, with citations to the record, raises no issues, and asks this court to independently review the record. (*People v. Wende, supra*, 25 Cal.3d 436.) Felix has not responded to this court’s invitation to submit additional briefing.

Following an independent review of the record, we find that no reasonably arguable factual or legal issues exist.

### **DISPOSITION**

The judgments are affirmed.