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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MAX DANILO MARTINEZ,

Defendant and Appellant.

G049593

(Super. Ct. No. 09CF2979)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Patrick Donahue, Judge. Affirmed.

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

No appearance by Plaintiff and Respondent.

\* \* \*

A jury convicted Max Danilo Martinez of three counts of forcible rape (Pen. Code, § 261, subd. (a)(2); all statutory references are to the Penal Code), one count of rape of an intoxicated person (§ 261, subd. (a)(4)), and one count of forcible penetration with a foreign object (§ 289, subd. (a)(1)). In the present case, the jury also found Martinez committed forcible rape and penetration offenses against more than one victim in violation of the One Strike law. (§ 667.1, subs. (b)-(e) [persons convicted of specified offenses under certain circumstances “shall be punished by imprisonment in the state prison for 15 years to life”].) In December 2013, the trial court imposed an aggregate 66-years-to-life term comprised of consecutive 15-years-to-life terms for the forcible rape and penetration convictions, plus a consecutive six-year determinate term for rape of an intoxicated person.

Martinez’s appointed counsel filed a brief under the procedures outlined in *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). Counsel summarized the facts of the case, the procedural history, and possible legal issues with citations to the record and appropriate authority, but raised no specific issues, and asked this court to review the record to determine whether there were any arguable issues. Counsel did not argue against her client or assert the appeal was frivolous. Counsel submitted a declaration stating she reviewed the case, she advised Martinez of the nature of the brief, she sent Martinez a copy of the brief and the appellate record, and informed him he could file a brief on his own behalf. Counsel did not seek to withdraw, but she advised Martinez he could move to have counsel relieved. We gave Martinez 30 days to file a supplemental brief, but he did not avail himself of the opportunity.

#### FACTS AND PROCEDURAL BACKGROUND

##### *Count 1 – Forcible Rape (§ 261, subd. (a)(2)) Against Vanessa R.*

Vanessa R. testified that on an evening in May 2000, when she was 14 years old, Martinez drove up alongside her and a friend as the girls walked near a shopping mall in the City of Orange and asked if they needed a ride. The girls who had

consumed alcohol at home earlier in the evening, agreed to accompany him for a drink. He purchased beer, and they ended up at a Garden Grove apartment where they conversed and imbibed. Martinez drove the friend home around 1:30 a.m., but Martinez ignored Vanessa's request to take her home. She ultimately agreed to more drinking back at the apartment. Vanessa became intoxicated, Martinez pushed or nudged her down on a bed, removed her underwear, and ignored her demands to "stop" and "take me home." Martinez had sexual intercourse with Vanessa and afterward drove her home.

Vanessa's sister testified Vanessa was crying when she arrived home and told her a man had raped her. Vanessa told their mother the next day, and she called the police. Vanessa accompanied officers to the apartment and identified Martinez and his red Honda. Vanessa told a police officer at the hospital Martinez grabbed her upper arms, pushed her back onto the bed, and held her arms against the bed during the sexual assault. She also said he put his hand on her vagina, rubbed the outside of it, and inserted his finger. Martinez also gave her oral sex. Vanessa had a fresh, bleeding tear on her hymenal tissue and a superficial tear on the posterior forchette that supported Vanessa's statements that recent vaginal penetration occurred.

Martinez testified he and Vanessa engaged in consensual sex. He denied pushing her onto the bed, she did not cry, and she never told him to stop. Police arrested him the next day and he initially denied having sex with anyone in the past few days. He lied because he was nervous and "freaked out."

*Count 2 – Forcible Rape (§ 261, subd. (a)(2)) Against Ashley M.*

In January 2002, 18-year-old Ashley M. started a new job at a cellular phone kiosk at a Westminster mall. Martinez, her supervisor, asked if she wanted to have drinks and "hang out" with "maybe some other people being involved." Ashley agreed to go with Martinez. He stopped at a convenience store to buy beer and whiskey, and then rented a motel room a few blocks from the mall so they would have a place to drink. Ashley consumed a beer and two-thirds of a cup of whiskey and became ill about 30 to

45 minutes after arriving at the room. This was unusual because she routinely drank more without becoming sick. She vomited repeatedly. They returned to the kiosk to close up. Martinez helped her back to the mall, where Ashley continued to vomit. He then helped her to the car and drove back to the motel room. He removed her clothes and held her up in the shower to rinse off. He then placed her on the bed, got on top of her, and had sexual intercourse with her “sick, lifeless body.” She said “no” several times and previously had “made it clear . . . that there would be nothing [sexual] going on” because she had a boyfriend. But she was too sick and weak to physically resist him. Ashley was also scared and intimidated and did not know what would happen if she fought him. She “just laid there, puking and crying.” She had him drop her off near her apartment so he would not know where she lived. Her boyfriend was waiting for her, and she told him to “go after [defendant].” They went to the motel and called the police. A sexual assault nurse testified Ashley said she had been vaginally penetrated, and there were multiple lacerations on the forchette portion of her vagina consistent with recent vaginal penetration.

Martinez testified he and Ashley had consensual sexual intercourse. When he dropped her off at home, she noted a man leaning against a sign and said “Shit. That’s my boyfriend.” He heard the boyfriend ask “where the hell she had been.”

*Count 3 – Forcible Sexual Penetration with a Foreign Object (§ 289, subd. (a)(1))  
Against Naomi B.*

In October 2005, 18-year-old Naomi worked at a pizza restaurant in Garden Grove. She first met Martinez, who identified himself as Daniel Hernandez, when he offered her a ride as she walked home from work. She had seen him before at the restaurant. He had his young son in the car and did not seem threatening. She gave him her phone number and rode home with him on one occasion without incident. On October 11, he came by to give her a ride home. On the way home he made various stops, including at a liquor store. He drove to a motel parking lot in Orange and mixed

them drinks. After they drank for about 30 minutes, Naomi had to use the restroom and Martinez pointed to one of the motel rooms. He told her he could not drive in his condition and was going to the motel office to get a room. She went in to use the restroom. She told him she wanted to leave, she needed to get home to her infant son, but he pushed her back toward the bed by the shoulders and got on top of her. She began crying and told him to stop. He kissed her and told her to be quiet. He took down her jeans, and he moved her underwear to the side and touched her. She tried to push him off. She told him she was on her period. He removed her tampon and touched her again, inserting his finger into her vagina. She began screaming louder and he stopped and got off of her. He drove her to her cousin's house, and she walked to her boyfriend's home and called the police. Martinez's name and driver's license number appeared on a registration record for the room identified by Naomi.

Martinez admitted on the stand he introduced himself as "Daniel," but denied digitally penetrating Naomi, claiming they only talked and kissed in the motel room.

*Count 4 – Rape of an Unconscious Person (§ 261, subd. (a)(4)) Against V.S.*

In March 2008, 17-year-old V.S. was walking in Corona (Riverside County) on the way home from the courthouse where she had paid her boyfriend's traffic fine. A man later identified as Martinez, wearing medical scrubs and identifying himself as Daniel Sanchez, drove up alongside and engaged her in conversation. She ultimately accepted his invitation to go to a party. Martinez drove to a convenience store and bought vodka. They began drinking and he drove west on the 91 Freeway, eventually stopping at a park. V.S. felt drunk, and decided she did not want to drink anymore so she intentionally spilled her drink. He poured his drink into her cup, and she had no memory of events until she regained consciousness to find Martinez on top of her. A nurse who examined her at the hospital noted V.S. had bruises on her arms and abrasions on her

interior genitalia consistent with recent vaginal penetration. DNA from sperm taken from a swab of V.S.'s vaginal area matched Martinez.

Martinez testified he stopped his car after he and V.S. made eye contact. He drove her to the courthouse so she could pay her boyfriend's fine, and they agreed to drink together in Orange County. He bought some alcohol and they drove to a park in the City of Orange where they engaged in consensual sexual intercourse.

*Count 8 – Forcible Rape (§ 261, subd. (a)(2)) Against Erica M.*

On December 1, 2009, Martinez, dressed in medical scrubs, drove up to 23-year-old Erica M. in Santa Ana where she was waiting for a bus to go a medical clinic. After conversing, Erica accepted defendant's offer of a ride. When they got to Erica's clinic, it was closed. Erica agreed to go with Martinez to a fast food restaurant. He grabbed two cups of ice and they drove through the parking lot and parked near a bank. Erica drank a pink liquid containing alcohol and soon felt dizzy and sick. Martinez drove Erica back to the restaurant so she could use the restroom, and then he drove her back to the parking lot and parked the car.

Martinez grabbed Erica and moved her to the back of the van where he had reclined the seats. He got on top of her and began to touch her. He undressed her and had sexual intercourse with her. He also orally copulated her. Her "whole body felt numb," she was "weak" and "trying to get up," but could not. She did not want to have sexual relations with him, but did not remember if she told him to stop, although she told an officer she "continually told him to stop." She was "lost," "in shock," "dizzy," and "didn't know what was going on." She tried to grab something, apparently the car door handles, to get away, but he grabbed her hands and put them by her side. At some point, she threw up on the ground outside the van. She passed out and when she awoke they were in a motel room. He told her he could not leave her there because he needed to pick up his children in Los Angeles. He then dropped her off at a park and she walked to her workplace. She reported the assault to the police. Martinez's name and driver's license

number appeared on a registration record for a Santa Ana motel room rented December 1, 2009. A nurse who performed a sexual assault exam testified Erica had bruises on her elbows and knees and multiple genital tears on the posterior forchette consistent with recent vaginal penetration. DNA from semen in Erica's vagina matched Martinez.

Martinez disputed Erica's account, testifying she consented to have sex with him in the car and the motel room.

*Leticia M.*

Leticia M., age 28 at trial, testified she accepted a ride from a person later identified as Martinez, who she did not know, after work in April 2008. Rather than drive her home, he took her to a parking lot a few miles away in Orange, where he inserted his finger into her vagina, orally copulated her, and had sexual intercourse with her. She tried to push him away, but he ignored her pleas to let her out of the car or stop the sexual assault. When he finished, he drove to a gas station, and she went into the bathroom. When she came out, Martinez had driven off. She phoned the police. Martinez's DNA was found on a swab taken from Leticia's vagina. A nurse's findings were consistent with Leticia's description of the sexual acts.

Martinez testified Leticia agreed to have drinks with him and later consented to have sex with him. The jury did not convict Martinez of charges (counts 5-7) relating to this incident.

*Martinez's Statements to Police and Testimony*

Santa Ana police arrested Martinez in early December 2009 after the incident with Erica. Orange police officers investigating the Naomi incident interviewed him at the jail about two weeks later. He told officers he did not remember the complainants or the circumstances of the incidents. As related above, Martinez testified and admitted engaging in consensual sex acts with most of the complaining witnesses.

## DISCUSSION

Following the *Wende* guidelines, we have reviewed counsel's brief and the entire appellate record and discern no arguable issue. We have specifically reviewed the items cited by appellate counsel including: (1) whether the statute of limitations barred prosecution of counts 1 and 2 for rape in violation of section 261, subdivision (a)(2); (2) whether constitutional proscriptions against ex post facto laws prohibited prosecution of count 1 or 2 under the "One-Strike" law; (3) whether the trial court erred in denying defense counsel's motion to sever the trial on the various counts; (4) whether the Orange County Superior Court had jurisdiction over count 8 [*sic* count 4, involving V.S.], which allegedly occurred in Riverside County; (5) whether the trial court erroneously denied defense counsel's motion to exclude testimony of the DNA case managers on confrontation clause grounds; (6) whether the trial court properly denied Martinez's motion to suppress his December 2009 interview with Orange police officers on *Miranda* grounds; (7) whether the trial court prejudicially erred in admitting over defense objection the complainants' preexamination statements to sexual assault examiners; (8) whether defense counsel rendered ineffective assistance of counsel in failing to request a mistrial because the prosecutor violated an in limine ruling during Martinez's cross-examination; (9) whether the trial court prejudicially erred in failing to instruct the jury on assault with intent to commit rape as a lesser included offense of forcible rape; (10) whether the trial court erred in excusing a juror for misconduct during deliberations; (11) whether the evidence was sufficient to sustain the forcible rape verdicts on one or more counts; and (12) whether the prosecution was required to charge any count as rape of an intoxicated person rather than forcible rape.

Martinez has not availed himself of the opportunity to file a supplemental brief (*People v. Kelly* (2006) 40 Cal.4th 106, 111 [appellate court must address issues raised personally by appellant in a *Wende* proceeding]), nor has he requested to have appellate

counsel relieved. Consequently, we affirm the judgment. (*Wende, supra*, 25 Cal.3d at p. 443.)

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.