

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

AVELINO RODRIGUEZ,

Defendant and Appellant.

H037465

(Santa Clara County

Super. Ct. No. C1094256)

I. INTRODUCTION

Defendant Avelino Rodriguez pleaded no contest to two counts of forcible oral copulation (Pen. Code, § 288a, subd. (c)(2)(B)).¹ The victim in both counts, B., was under the age of 14 and more than 10 years younger than defendant. The trial court imposed the stipulated total term of 22 years in the state prison.

Defendant filed a timely notice of appeal, and we appointed counsel to represent him in this court. Appointed counsel has filed an opening brief that states the case and facts but raises no issue. We notified defendant of his right to submit written argument on his own behalf within 30 days. The 30-day period has elapsed and we have received no response from defendant.

Pursuant to *People v. Wende* (1979) 25 Cal.3d 436 and *People v. Kelly* (2006) 40 Cal.4th 106, we have reviewed the entire record. Following the California Supreme

¹ All further statutory references are to the Penal Code.

Court's direction in *People v. Kelly, supra*, at page 110, we provide "a brief description of the . . . procedural history of the case, the crimes of which the defendant was convicted, and the punishment imposed."

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

Our summary of the facts is taken from the October 7, 2011 probation report.

During the course of investigating an attempted homicide in which defendant was the alleged victim, a San Jose Police Department investigator interviewed B., age eight. B. told the investigator that defendant had sexually assaulted her.

B. was subsequently interviewed by an investigator from the San Jose Police Department Sexual Assaults Investigations Unit. She told the investigator that defendant was a family friend who had spent Thanksgiving with her family. While B. was asleep in the living room, defendant removed her pants and underwear and taped her mouth shut with duct tape. Defendant then orally copulated her for approximately two minutes. He also touched her buttocks over her clothing and kissed her about the lips. The sexual assault was interrupted by B.'s stepfather, who then battered defendant and told B. to go upstairs.

At some point, defendant told B. that that he was sorry. B. also recalled that defendant removed the duct tape he had placed over her mouth and discarded the tape where her stepfather could not find it.

On November 29, 2010, B.'s stepfather confronted defendant about the sexual assault on B., then assaulted him. On December 2, 2010, a San Jose Police Department investigator interviewed defendant in the hospital where he was being treated for a broken jaw. During the interview, defendant admitted that he had orally copulated B. twice on the same occasion, but denied that he had placed anything on her mouth or kissed her.

B. Procedural Background

The original complaint filed on December 7, 2010, charged defendant with one count of oral copulation on a child 10 years of age or younger (§ 288.7, subd. (b); count 1).

On July 12, 2011, a document entitled “AVELINO RODRIGUEZ PLEA RESOLUTION” was filed, which states in its entirety: “By stipulation, the parties intend to, and do, enter [into] the following agreement as to charges and sentence: [¶] (1) The People will move to amend the complaint to allege two counts of violations of [section 288a, subd. (c)(2)(B)], oral copulation of a person under the age of 14, by means of force, violence, duress, menace, or fear of immediate unlawful bodily injury, each count being a crime punishable by 8, 10, or 12 years in the state prison. [¶] (2) Defendant will enter a plea of guilty [or] no contest to both counts of [section 288a, subd. (c)(2)(B)]. [¶] (3) The sentence for conviction on these two counts will be exactly 22 years in state prison, no more, and no less. The sentence will be arrived at by imposing an aggravated term of 12 years on one count, and a fully consecutive count of 10 years on the second count, or in any other lawful manner of arriving at the agreed sentence. Defendant will be informed, and understands, that he will be required to serve at least 85% of the prison sentence before being released on parole. [¶] (4) For purposes of the Three Strikes Law in the future, the parties agree and stipulate that both [section 288a, subd. (c)(2)(B)] counts were ‘committed on the same occasion, and arise from the same set of operative facts’ within the meaning of [sections] 667[, subd.] (c)(6) and 1170.12[, subd.] (a)(6), as they were committed during one continuous course of conduct lasting only approximately two minutes.”

The People filed a first amended complaint pursuant to the parties’ stipulation, which charged defendant with two counts of forcible oral copulation on a victim under the age of 14 (§ 288a, subd. (c)(2)(B); counts 1 & 2).

On July 12, 2011, defendant entered into a plea agreement in which he pleaded no contest to the charges in the first amended complaint in exchange for a sentence of 22 years in the state prison. Before accepting defendant's no contest pleas, the trial court determined that defendant had made a knowing, intelligent, and voluntary waiver of his constitutional rights and there was a factual basis for the plea. Additionally, the trial court advised defendant, among other things, that the maximum sentence that could be imposed on the charges was 24 years, his parole period was 20 years, he would be required to register as a sex offender, commission of a another felony could result in a sentence of 25 years to life under the Three Strikes law, and he could be ordered to pay various fines and fees.

At the time of the sentencing hearing held on October 7, 2011, the trial court heard and denied defendant's *Marsden* motion. (*People v. Marsden* (1970) 2 Cal.3d 118.) The trial court then imposed the stipulated sentence of 22 years, composed of the aggravated term of 12 years on count 1 and a consecutive middle term of 10 years on count 2. The court also ordered defendant to register as a sex offender under section 290 and to pay an \$8,800 restitution fine (§ 1202.4, subd. (b)). The imposition of an \$8,800 parole revocation restitution fine (§ 1202.45) was suspended. No other fines or fees were ordered. The court granted defendant presentence credit of 351 days (306 actual days and 45 days pursuant to section 2933.1).

C. Appeal

Defendant filed a timely notice of appeal on October 14, 2011. Having carefully reviewed the entire record, we conclude that there are no arguable issues on appeal. (*People v. Wende, supra*, 25 Cal.3d at pp. 441-443.)

III. DISPOSITION

The judgment is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MÁRQUEZ, J.