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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MARIO GONZALEZ, Defendant and Appellant.	E082435 (Super.Ct.No. INF2202372) OPINION

APPEAL from the Superior Court of Riverside County. Charles J. Koosed, Judge. Affirmed.

Edward Mahler, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Mario Gonzalez appeals from a judgment of conviction following his guilty plea to torture and related offenses. We appointed counsel to represent Gonzalez on appeal, and counsel filed a brief under *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) and

Anders v. California (1967) 386 U.S. 738, raising no issues and asking us to conduct an independent review of the record.{AOB 7} After counsel filed the *Wende* brief, we advised Gonzalez that he could file a personal supplemental brief, which he has done. We reject Gonzalez's arguments, and our independent review of the record has revealed no arguable issues. We therefore affirm the judgment.

BACKGROUND

As of November 2022, the victim (K.D.), who was a material witness for the People, had repeatedly failed to appear under subpoena to testify, and Gonzalez's case was dismissed.{CT 34, 36-37} The People refiled an information alleging that Gonzalez committed torture (Pen. Code, § 206; unlabeled statutory citations refer to this code), mayhem (§ 204), kidnapping (§ 207, subd. (a)), assault with a deadly weapon with a great bodily injury enhancement (§§ 245, subd. (a)(1), 12022.7, subd. (e), 1192.7, subd. (c)(8)), and willful infliction of corporal injury with a great bodily injury enhancement (§§ 273.5, subd. (a), 12022.7, subd. (e), 1192.7, subd. (c)(8)).{CT 22-24} The People further alleged aggravating factors including that Gonzalez's offenses involved great violence, that he used a weapon, that he was a serious danger to society, that he had multiple prior convictions that were increasing in seriousness, and that the victim was particularly vulnerable.{CT 25} (Cal. Rules of Court, rule 4.421(a)(1)-(3), (b)(1), (2).) The People alleged that Gonzalez had a prior conviction for assault with a deadly weapon. (§§ 245, subd. (a)(1), 667, subd. (a).){CT 24} Gonzalez pled not guilty to all charges.{CT 14, 28}

In January 2023, defense counsel filed a motion to continue the trial because she was recently assigned to Gonzalez's case, was engaged in another trial, and needed additional time to prepare for Gonzalez's trial.{CT 41-47, 51} On February 10, 2023, the last day for trial to begin, an attorney appearing on behalf of Gonzalez's appointed counsel orally requested a continuance.{CT 57} Gonzalez personally objected to the continuance.{CT 57} The trial court found good cause and continued the trial to February 27, 2023.{CT 57}

During a conditional examination in March 2023, K.D. testified that she and Gonzalez were in a relationship "on and off" for approximately one year.{RT 609-610} In November 2020, they had been separated for about one month because their relationship was "combative."{RT 610} Both of them were homeless and lived in the desert near a watering hole.{RT 610} At about 11:00 p.m. one evening, K.D. washed her clothes at the watering hole and then headed back to her camp, which was about 50 to 75 feet from Gonzalez's camp.{RT 610-611} They crossed paths and began to fight, and she tried to hit him.{RT 612-613} Gonzalez hit her multiple times, and she dropped to her knees to protect her stomach because she was pregnant.{RT 613} Gonzalez continued hitting her while she was on the ground.{RT 613-614} He hit and kicked her "all over," including on her head.{RT 614, 637-638}

After Gonzalez stopped hitting K.D., she walked with him back to his camp because she "just wanted to get out of that situation."{RT 614} When they got there, she "pass[ed] out," because she "was on drugs at the time" and "just wanted to sleep it off,

sleep off the pain, sleep off the argument, sleep everything off, so [she] just went to sleep."{RT 617} She woke up after about 48 hours, and Gonzalez appeared angry.{RT 618} K.D. tried to get up, and he hit her in the leg with a metal bar about five or six times.{RT 618-620} Gonzalez threw the metal bar at her, and "[i]t hit [her] dead center in [her] face and shattered [her] mouth."{RT 620} She could feel pieces of her teeth in the back of her throat, and she spit them out.{RT 620} Her face was cut "from the center of her lip [to] approximately one inch to the right side of her nose,"{RT 656-657} and her face was "covered in blood."{RT 643}

K.D. saw "instant remorse" in Gonzalez, and he started to cry.{RT 621} She insisted that they go and get some water so that she could get cleaned up. They headed to K.D.'s camp, and she told Gonzalez that she loved him and that he needed to get her some water.{RT 622} When he left, she "took off running" because she was worried that he might kill her when he returned.{RT 622} She ran to her daughter's father, who was nearby, and he gave her his car to drive to her mother's house.{RT 622} When K.D. got there, her mother took K.D. into the house, and the next thing K.D. could remember was being in an ambulance.{RT 622}

After the jury was impaneled in March 2023, the trial court informed counsel in a chambers conference that Gonzalez's sentence would be 14 years to life if he "ple[d] to the sheet," and he "could not do any worse" than 14 years to life.{RT 1826, 2106} Gonzalez then pled guilty to each of the charged offenses and admitted the great bodily injury enhancements, the aggravating factors, and the prior strike.{RT 1826-1835; CT

117-119} The court deferred finding a factual basis for Gonzalez's plea to the sentencing hearing to allow the probation department to prepare its sentencing report.{RT 1835-1837} Defense counsel requested that probation "not talk to [her] client without [her]," and the court ordered that the probation department not speak to Gonzalez without defense counsel present.{RT 1837; CT 119}

In October 2023, the probation department filed its sentencing recommendation.{CT 163-179} The report noted that in March and April 2023, the department attempted to contact defense counsel to schedule an interview with the defendant. But the probation officer later forgot about the court's order prohibiting the interview without defense counsel and interviewed Gonzalez despite counsel's absence.{CT 170} Upon realizing its mistake, the department contacted defense counsel, indicating that nothing from the interview would be included in its report.{CT 170}

At the sentencing hearing, the trial court considered Gonzalez's motion to strike his enhancements.{RT 2106-2111} The court denied the motion, finding that "the facts of this case are horrific" and that this is not the type of case "for that kind of remedy."{RT 2107} The court sentenced Gonzalez to a term of 7 years to life for torture, doubled to 14 years to life for the prior strike.{RT 2107-2110, 2113; CT 140-153, 185} The court also imposed but stayed under section 654 the upper term of eight years for mayhem, doubled to 16 years for the prior strike; the upper term of eight years for kidnapping, doubled to 16 years for the prior strike; the upper term of four years for assault with a deadly weapon, doubled to eight years for the prior strike; and the upper

term of four years for domestic violence, doubled to eight years for the prior strike.{RT 2113-2114; CT 185-186} The court struck the five-year sentence for the prior serious felony conviction and calculated that Gonzalez had 1,120 days of custody credit.{RT 2116-2117; CT 186}

DISCUSSION

Gonzalez's appellate counsel filed a *Wende* brief identifying six potentially arguable issues: (1) whether the trial court erred by deferring the finding of a factual basis for Gonzalez's plea to the sentencing hearing; (2) whether the record was "sufficient to establish as a matter of law" that Gonzalez committed mayhem; (3) whether the record was "sufficient to establish as a matter of law" that Gonzalez personally inflicted great bodily injury; (4) whether the trial court "deprive[d]" Gonzalez of his right to a speedy trial; (5) whether defense counsel provided ineffective assistance of counsel by failing to move for dismissal based on the trial court's "denial" of Gonzalez's right to a speedy trial; and (6) whether the court asked Gonzales to agree to a continuance when defense counsel was not present.{AOB 7-8} Counsel asked that we conduct an independent review of the record.{AOB 7} After counsel filed the *Wende* brief, we advised Gonzalez that he could file a personal supplemental brief, which he did.

Gonzalez argues that (1) he received ineffective assistance of counsel; (2) he was denied his right to a speedy trial; (3) the trial court failed to consider mitigating circumstances at sentencing; and (4) there was "racial dispa[]rity" underlying his conviction.{SUPPB 1-5} We reject the arguments.

I. *Ineffective assistance of counsel*

Gonzalez argues that defense counsel rendered ineffective assistance because she missed the scheduled last day of trial and the case would have been dismissed had she been there.{SUPPB 1-2} Gonzalez also argues that he received ineffective assistance of counsel because counsel did not attend his probation interview, did not submit letters in mitigation to the court, and did not "reach [the] mitigating factors."{SUPPB 1-2}

"To establish ineffective assistance of counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and counsel's deficient performance was prejudicial, that is, there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant." (*People v. Sepulveda* (2020) 47 Cal.App.5th 291, 301; *Strickland v. Washington* (1984) 466 U.S. 668, 687-692.) We presume "that counsel's actions fall within the broad range of reasonableness, and afford 'great deference to counsel's tactical decisions.'" (*People v. Mickel* (2016) 2 Cal.5th 181, 198.)

Gonzalez argues that he received ineffective assistance of counsel because but for his counsel's absence on the last day of his trial, the case would have been dismissed.{SUPPB 2} Even if his contention is correct, it is irrelevant. Subdivision (a) of section 1387.1 provides that "[w]here an offense is a violent felony, as defined in Section 667.5 and the prosecution has had two prior dismissals, as defined in Section 1387, the people shall be permitted one additional opportunity to refile charges where either of the prior dismissals under Section 1387 were due solely to excusable neglect."

One example of excusable neglect occurs where "prosecutors [were] unable to locate or produce a witness despite reasonable efforts." (*People v. Turner* (2023) 97 Cal.App.5th 568, 573.) Gonzalez's case was originally dismissed "due to the People's inability to proceed without the material witness,"{CT 37} so the People would have been able to refile the case for a third time. For this reason, Gonzalez cannot show that he was prejudiced by his counsel's absence, so his ineffective assistance of counsel argument on this basis fails.

Gonzalez also contends that he received ineffective assistance of counsel because his attorney did not attend his probation interview and did not submit letters in mitigation to the court, and his subsequently appointed attorney did not "reach [the] mitigating factors."{SUPPB 1-2} Assuming for the sake of argument that counsel erred, Gonzalez has not shown that he was prejudiced by the purported errors. Even though his counsel was not present for the probation interview, the department excluded any information it received from the interview. Gonzalez also admitted each aggravating factor that was alleged. The trial court considered letters submitted by the defendant and his request to strike the enhancements, and the court noted that "the facts of this case are horrific."{RT 1834-1835, 2107} One aggravating factor is sufficient to support imposition of the upper term. (*People v. Lynch* (2024) 16 Cal.5th 730, 764.) Given the totality of the circumstances, we see no reasonable probability that Gonzalez would have received a more favorable sentence in the absence of counsel's purported errors.

II. *Right to a speedy trial*

Gonzalez claims that his right to a speedy trial was violated when the trial court granted a continuance on the last day of trial over his objection even though the People "did not have a witness."{SUPPB 3} When Gonzalez pled guilty to the charged offenses, however, he waived his speedy trial claim.{CT 116-117} (*People v. Egbert* (1997) 59 Cal.App.4th 503, 508.) He therefore cannot raise it now.

III. *Circumstances in mitigation*

Gonzalez argues that the trial court erred by failing to consider mitigating factors at sentencing.{SUPPB 2} At the sentencing hearing, the trial court expressly considered defense counsel's motion to strike Gonzalez's prior strike and any enhancements.{RT 2104} The court considered letters from K.D. and the acceptance letter from a residential program and found that this was not "a good case for that kind of remedy" because K.D. "suffered horrible injuries. Her tooth was bashed out. Her lip was split, black eyes. She was beaten pretty badly. She was kept against her will."{RT 2106-2107} The court noted that Gonzalez's crimes were "escalating" and that he "admit[ted] the aggravating factors," and the court found that the circumstances in aggravation "far outweighed" any mitigating factors.{RT 2107-2108} The record thus demonstrates that the court considered the evidence in mitigation but found that it was outweighed. Gonzalez's argument therefore fails.

IV. *Racial Justice Act*

Gonzalez argues that there was "racial dispa[]rity" underlying his conviction because the victim, the trial court judge, the prosecutors, and his own defense counsel were White, and Gonzalez is Hispanic.{SUPPB 5} Gonzalez did not raise the issue in the trial court, so he may not raise it now for the first time on appeal. (*People v. Lashon* (2024) 98 Cal.App.5th 804, 814-815.) The argument is therefore forfeited. In any event, the facts identified by Gonzalez do not constitute a prima facie showing of a violation of subdivision (a)(1)-(4) of section 745.

V. *Independent review of the record*

We have independently reviewed the record and found no arguable error that would result in a disposition more favorable to Gonzalez. (*Wende*, *supra*, 25 Cal.3d. at pp. 441-442.) Accordingly, we affirm the judgment.

DISPOSITION

The judgment is affirmed.

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MENETREZ
J.

We concur:

MILLER
Acting P. J.

RAPHAEL
J.