Filed 3/2/17 P. v. Lee CA2/4

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ROBERT DEAN LEE,<br><br>Defendant and Appellant. | B272259<br><br>(Los Angeles County Super. Ct. No. YA091322) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark S. Arnold, Judge. Affirmed.

Law Offices of Lawrence S. Strauss and Lawrence S. Strauss, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Robert Dean Lee appeals from a judgment entered after a jury found him guilty of numerous counts of sexually molesting a child under 10 years of age and one count of possession of child pornography. On appeal, defendant argues that he received ineffective assistance of counsel because his attorney (1) changed positions regarding defendant's mental competence to stand trial, (2) failed to plea bargain in good faith, (3) failed to investigate and adequately prepare for trial, (4) failed to present expert witness testimony, and (5) permitted defendant to testify at trial. Defendant also contends that the cumulative effect of his trial counsel's allegedly deficient performance was prejudicial and warrants reversal. We do not agree, and shall affirm the judgment of conviction.

## FACTUAL AND PROCEDURAL SUMMARY

The Los Angeles County District Attorney's Office filed a six-count information on February 4, 2015, charging defendant with one count of oral copulation or sexual penetration of a child 10 years of age or younger (Pen. Code, § 288.7, subd. (b); count 1),[1] four counts of committing a lewd act upon a child (§ 288, subd. (a); counts 2-5), and one count of possession of child pornography (§ 311.11, subd. (a); count 6). The charges followed an investigation by the Manhattan Beach Police Department into allegations that defendant, a 79-year-old man, sexually molested his eight-year-old distant relative, M.B., when her family visited defendant and his wife in July 2014.

### A. *Police Investigation*

On September 4, 2014, Detective Aleina Smith interviewed M.B's mother and learned that M.B. had written about the incidents in her journal. Detective Smith took M.B. and her

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[1] All further statutory references are to the Penal Code.

mother to a child sexual abuse treatment center, where a social worker, Nicole Farrell, conducted a video-recorded forensic interview of M.B.. M.B. told Farrell that defendant "was being inappropriate with me," that "[h]e was showing me his private parts, and he was making me touch it, and he made me read books on sex, and he had these two rumbly things." She explained that when defendant took her for a ride in his Corvette, he made her read a book about sex, talked to her about sex toys, and had her put the "rumbly things" on her vagina.

M.B. described several incidents that occurred in defendant's bedroom. She said one time she agreed to take her clothes off with defendant and he "wanted to kiss [her] all over" and bathe with her. She said defendant showed her two black panties and a top, which he kept in a hiding place in his bedroom, and told her "he wanted to take pictures of [her] in those in poses." When asked about when defendant showed his "private part" and made her "touch it," she explained that defendant removed his pants and made her touch his erect penis as he was leaning against the door so nobody would come into the bedroom. She said one time defendant told her to cuddle with him, exposed himself and said, "touch it." When asked whether defendant ever kissed her, she said: "He kissed my vagina." She also stated that defendant touched her vagina with his fingers and "just kept moving with his fingers."

The next day, Detective Smith met with M.B.'s mother and conducted a pretext call to defendant.[2] During the call, defendant

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[2] A pretext call is a recorded telephone conversation between a suspect and someone associated with the case used to elicit information from the suspect and corroborate a victim's allegations.

admitted he had talked to M.B. about sex and that he had given her a book describing the "mechanics of things." Appellant said he "tried to let her know that sex is not something to be guilty about." When asked whether he gave her a sex toy, he said: "Uh, I had a, uh, uh, a vibrator." Defendant said he did not give her the vibrator, but he "let her play with it and told her that playing with yourself is not—is a good alternative to actually having sex." When asked whether he showed his penis to M.B., he said: "I didn't. She might have, uh, seen it." Defendant denied kissing her vagina.

On the same day, Manhattan Beach Police officers executed a search warrant on defendant's home. Officers searched defendant's bedroom and discovered a shuttered cabinet in the closet. In the cabinet, they found one small, black mesh item of lingerie and four items of ladies underwear—one blue, one pink, and two black. They also discovered a sex education book for young people and an external hard drive. The hard drive was seized and analyzed by a United States Secret Service agent. The forensic examination of the hard drive yielded 20,000 images of child pornography.

B. *Pretrial Proceedings*

On February 4, 2015, defendant was arraigned and pleaded not guilty to all charges. Bail was set at $2,000,000. Defendant was remanded to custody where he remained throughout the criminal proceedings.

I. *Defendant's Mental Competence*

On July 20, 2015, defendant's trial counsel declared a doubt as to defendant's mental competence, and the court suspended the proceedings. Defense counsel explained that defendant was 80 years old and possibly suffering from dementia or Alzheimer's

disease. The court appointed Dr. Richard Romanoff for the defense and Dr. Kory Knapke for the prosecution to examine the defendant and report back by the next hearing date.

On September 2, 2015, the court was informed that Dr. Knapke attempted to examine defendant in jail, but defendant refused to be interviewed without his attorney present. The parties were in court again on September 22, and reported that defendant still refused to speak with Dr. Knapke. Defense counsel asserted that defendant had a right to have an attorney present during his examination by the prosecution's psychiatrist. At a November 2 hearing, defense counsel reiterated that defendant would not meet with Dr. Knapke, and requested that the court appoint another doctor for the prosecution who would be willing to have a lawyer present during the examination. The court declined to appoint a replacement doctor.

On November 10, defense counsel withdrew his request for a competency hearing. Counsel stated he had had "extensive conversations since the last hearing" with defendant, and had "no question [that] he's competent." The court stated that once a doubt as to defendant's competence has been declared, it is obligated to make a finding. The prosecutor informed the court that Dr. Knapke's report was not complete, but he had submitted a draft. The court also was informed that although Dr. Romanoff had been retained by the defense, he had not evaluated defendant's competence. The court briefly spoke with the defendant and reviewed the incomplete report by Dr. Knapke in addition to a report by Dr. Romanoff dated May 4, 2015.[3] After

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[3] Dr. Romanoff's report was later attached to defense counsel's sentencing memorandum. Dr. Romanoff conducted five interviews with defendant and administered several cognitive

reviewing the reports, the court found defendant mentally competent to stand trial within the meaning of section 1368. The court specifically found that defendant was "able to understand the nature of the proceedings against him and [wa]s able to assist his attorney in conducting a defense in a rational manner."

II. *Plea Bargaining*

At a hearing on January 22, 2016, defense counsel indicated the plea "offer on the table is ten years," but because defendant was 80 years old, "[t]his is a case we have to try." Counsel also noted that defendant was willing to "plead to the mid term on the pornography which makes . . . him registerable." The prosecutor informed the court that there had been settlement discussions, but the parties had been "so far afield" that there was no agreement.

When asked what defendant's maximum prison term would be, defense counsel stated that, because of defendant's advanced age, the maximum sentence was "almost irrelevant." The prosecutor explained that the exposure was 15 years to life in prison for count one plus an additional 14 years and eight months for the remaining charges. The prosecutor explained that defendant was "looking for a two-year sentence," which essentially "would be almost time served . . . and it would not reflect in any way the child molestation he committed."

The court suggested the parties get together informally to

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tests. Dr. Romanoff found that appellant has been "exhibiting increasingly clear evidence of a deteriorating dementia," was confused and disorganized when recounting information, and that his cognitive abilities had deteriorated from peak functioning. The report's conclusions focused on the propriety of granting probation. The report did not address whether the defendant was mentally competent to stand trial.

discuss whether there was any possibility of settlement. Defense counsel suggested that if the prosecutor "would want some restriction on my client to make sure nothing like that ever happened again[,] [t]here may be a way of handling that." A month later, the court inquired as to the prosecution's last offer and was told there was an informal offer of 10 years, but no counteroffer by the defense. The case proceeded to trial.

III. *Proposed Defense Witness Testimony*

Jury selection began on February 23, 2016. In a hearing prior to voir dire, the court addressed several matters including the prosecutor's objections to the proposed testimony of defense witnesses. The prosecutor stated that he had not received any witness statements from the defense. Rather, a police detective had interviewed them. Defense counsel explained that most of these witnesses would testify to defendant's "bizarre" attitudes towards being nude around minors and discussing sex with them.

Defense counsel then stated that his investigator just informed him that some of the proposed witnesses would testify that defendant had provided them with sexually explicit materials such as manuals. The prosecutor objected to this proposed testimony on the ground that the defense had not provided any witness statements to that effect. Defense counsel confirmed that his investigator had written statements from the proposed witnesses, and the court ordered all statements to be provided to the prosecution by the end of the court day.

On February 26, the prosecutor explained that he had received the defense witness statements and that there were two areas of concern. The first was that several of the witness statements referred to prior instances where defendant went "skinny dipping" or "skinny skiing." The prosecutor maintained

that because no such activity occurred in this case, the testimony would be irrelevant and could lead to confusion. The court found defendant's history of naked swimming and skiing to be irrelevant, but stated defendant could testify that he liked to be nude. Second, two witnesses referred to an incident in which M.B. allegedly was straddling the leg of defendant's grandnephew and "humping" him. The prosecutor asserted that this proposed testimony was both irrelevant and barred by the Rape Shield Law (Evid. Code, § 1103, subd. (c)(1)). The court agreed and excluded all testimony regarding M.B. sitting on anyone's lap or engaging in what could be perceived to be sexual activity.

C. *Trial Proceedings*

In his opening statement, defense counsel conceded defendant was guilty of possessing child pornography, but asserted that does not necessarily mean he molested M.B.. He posited that defendant's inappropriate attitudes towards nudity and discussing sex with children were misunderstood by M.B.'s parents and resulted in false charges of molestation. He argued that M.B.'s written statement in her journal indicates that it was the product of questioning by an adult. He also questioned the reliability of M.B.'s statements made during the forensic interview, asserting that the social worker who conducted the interview was not impartial. He urged the jury to focus on the specific charges and determine whether the evidence is reliable enough to find defendant guilty beyond a reasonable doubt.

Following opening statements, the prosecution presented its case in chief. M.B. was sworn and testified consistently with the statements she had made during the forensic interview. When the prosecutor used a copy of the interview transcript to

refresh her recollection, defense counsel objected that he never had a copy of the transcript. Defense counsel cross-examined M.B., focusing his questions on the circumstances surrounding her journal entry and the forensic interview.

Detective Smith testified regarding her investigation. Two clips of the pretext call recording were played in court, and transcripts were presented to the jury. Ms. Farrell then testified about the forensic interview conducted with M.B.. A video recording of the interview was played in court, and transcripts were provided to the jury. Before Ms. Farrell began her testimony, defense counsel objected to introducing the forensic interview into evidence, arguing it was inadmissible under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). The court overruled this objection, stating that Ms. Farrell's statements were nontestimonial under *Crawford*. Defense counsel also argued the interview was inadmissible because the prosecutor did not provide formal notice under Evidence Code section 1360.[4] The prosecutor indicated that he had informed defense counsel in an email that he intended to introduce the interview. The court found the email constituted sufficient notice

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[4] Evidence Code section 1360, subdivision (a) provides that "[i]n a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse . . . is not made inadmissible by the hearsay rule" under certain enumerated conditions. Subdivision (b) provides: "A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement."

under Evidence Code section 1360 and ruled the interview recording could be played in its entirety. Defense counsel objected, arguing that if he knew the interview would be admitted, he would have asked M.B. specific questions about her prior statements. However, when the court asked counsel what questions he would have asked, he stated only that he "would have gone into [the] details of the statement."

The remaining prosecution witnesses testified about the search of defendant's home and seizure of the women's lingerie, the sex education book, and the external hard drive discovered in defendant's bedroom. These items were marked for identification and entered into evidence. The United States Secret Service agent who performed the forensic examination of the hard drive also testified, and the jury was presented with several examples of images depicting child pornography that were found on the hard drive. The prosecution rested its case.

Defendant was sworn and testified on his own behalf. He admitted that he was guilty of possessing child pornography. He testified that he discussed sex with M.B. after he witnessed her engaging in sexual behavior. He stated that M.B. found a vibrator during the Corvette ride and started to touch herself with it. Later, she followed him into his bedroom when he was changing and asked him to "drop" his pants, which he "stupidly did." He stated that she came over and touched him, and he immediately pulled up his pants. He denied kissing her on her vagina or touching her with his fingers.

During cross-examination, defendant admitted he had "fantasies as to" child pornography, but "not to actual children." He admitted that he found child pornography sexually arousing. He admitted exposing himself to M.B. a year before the alleged

molestations. Defendant also admitted that he was being "evasive" with M.B.'s mother, did not inform her of his sexual interactions with M.B., and had "lied" more than once during the pretext call. There was no redirect, and the defense rested.

In his closing argument, defense counsel acknowledged that defendant exhibited poor judgment, but noted that he consistently testified that he did not molest M.B.. Counsel questioned whether M.B.'s statements were reliable and noted that her allegations of molestation were not corroborated. He asked the jury to convict defendant of the child pornography charge and find a reasonable doubt as to the other counts. The jury deliberated for approximately two hours and found defendant guilty as charged on all six counts.

D. *Sentencing and Appeal*

Defendant was sentenced to an indeterminate term of 15 years to life in prison with the possibility of parole on count 1 and a total determinate term of 12 years and eight months for the remaining counts, including six years for count 2, two years for each of counts 3, 4, and 5 (one-third the midterm for each count), and eight months for count 6 (one-third the midterm), all running consecutively. The court ordered defendant to serve the determinate term prior to beginning the indeterminate term. Defendant was given credit for 635 days of presentence custody including 553 actual days. He filed a timely notice of appeal.

## DISCUSSION

To establish a claim of ineffective assistance of counsel, defendant must prove that (1) trial counsel's representation was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) the deficiency resulted in prejudice to defendant. (*Strickland v.*

*Washington* (1984) 466 U.S. 668, 687-696; *People v. Mai* (2013) 57 Cal.4th 986, 1009.) "Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 153, 215.) If defendant makes an insufficient showing on either one of these components, his ineffective assistance claim fails. (*Strickland*, at p. 687; *People v. Holt* (1997) 15 Cal.4th 619, 703.)

"When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance. It is particularly difficult to prevail on an appellate claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding. [Citations.]" (*People v. Mai*, *supra*, 57 Cal.4th at p. 1009, italics omitted; see also *People v. Vines* (2011) 51 Cal.4th 830, 875-876.)

**I**

Defendant first contends his trial counsel rendered ineffective assistance by changing positions about defendant's mental competence. In order to evaluate this claim, we first review the applicable standards and procedures governing competence in a criminal trial setting.

A defendant is incompetent to stand trial "if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (§ 1367, subd. (a).) If a doubt arises in the judge's mind as to the defendant's competence, the judge must state that doubt in the record and ask whether defense counsel believes the defendant is competent. (§ 1368, subd. (a).) If counsel informs the court that he or she believes the defendant is or may be incompetent, the judge "shall" order a competency hearing. (§ 1368, subd. (b).) However, if the judge has not declared a doubt, the judge is not required to conduct a hearing based solely on counsel's opinion. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1111.) Due process requires a hearing only if the court is presented with substantial evidence of incompetence. (*People v. Lawley* (2002) 27 Cal.4th 102, 136.) Evidence is substantial if it raises a reasonable doubt as to the defendant's competence. (*Id.* at p. 131.)

Defendant contends that his trial counsel "misled either the Court, his client, or both, when he declared a doubt" as to defendant's competency. He argues that trial counsel "either permitted or instigated" defendant's refusal to speak with Dr. Knapke, the prosecution-selected psychiatrist. In addition, the psychologist retained by the defense, Dr. Romanoff, never provided a report evaluating defendant's competence. Defendant maintains that trial counsel's tactic wasted time and was of no benefit to defendant or the court. Defendant argues that trial counsel's "flirting" with defendant's competency, and the court's "acquiescence," require a reversal of conviction and remand for a competency determination.

Defendant's arguments fall short of establishing that trial

counsel rendered ineffective assistance. Counsel acted within the range of prevailing professional norms when he withdrew his declaration of doubt after evaluating recent interactions with defendant. "If an attorney has doubts about his client's competence but those doubts are not supported by medical reports or substantial evidence, he does not render ineffective assistance by forgoing an evidentiary hearing. [Citation.]" (*People v. Garcia* (2008) 159 Cal.App.4th 163, 172.) Here, trial counsel explained to the court that his initial doubts about defendant's competence had been resolved through "extensive conversations" since the previous hearing. Although Dr. Romanoff's report indicated that defendant may have been suffering from dementia, the report did not conclude he was incompetent. The record does not otherwise show substantial evidence of incompetence. To the contrary, defendant testified cogently at trial and was able to recall, in detail, his version of the events at issue in this case. Trial counsel is not required to insist on a competency hearing in the absence of substantial evidence of incompetency. (*Id.* at p. 172.)

Even if defendant could establish deficient performance by his trial counsel, he has not demonstrated prejudice. This is because even after trial counsel withdrew his declaration of doubt, the trial court concluded that it was still required to conduct a competency hearing, and did so by evaluating defendant's behavior in court and reviewing the reports prepared by Dr. Knapke and Dr. Romanoff. The court found that defendant was able to understand the nature of the proceedings and to assist trial counsel in conducting a defense in a rational manner. Defendant's allegation that the court's determination was somehow procedurally deficient does not establish prejudice.

Moreover, given the absence of substantial evidence of incompetence, there is no reasonable probability the outcome would have been different if trial counsel had continued to declare a doubt as to defendant's competence.

**II**

Defendant also argues that trial counsel rendered ineffective assistance by failing to plea bargain in "good faith." To establish prejudice in the plea bargaining context, defendant must show that "but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." (*Lafler v. Cooper* (2012) 566 U.S. 156, 164; see also *In re Alvernaz* (1992) 2 Cal.4th 924, 936-938.)

Defendant contends trial counsel "never plea bargained" on his behalf, and "made no meaningful effort toward reaching a reasonable" plea agreement with the prosecution. This claim is not supported by the record. Trial counsel offered a plea to the midterm on count six for possession of child pornography and sought a two-year term. However, the prosecution indicated that a 10-year term was its lowest offer. The parties were too "far afield" to settle. On this record, defendant cannot demonstrate that trial counsel acted outside the range of reasonable professional norms. And even if defendant could demonstrate deficient performance, he cannot show prejudice because there is no indication that an offer imposing a less severe sentence would

have been forthcoming from the prosecution or would have been accepted by the court. (See *Lafler v. Cooper*, *supra*, 566 U.S. at p. 164; *In re Alvernaz, supra*, 2 Cal.4th at pp. 936-938, 940.)

**III**

Defendant next asserts that trial counsel rendered ineffective assistance by failing to investigate and prepare for trial with regard both to the proposed defense witnesses and his preparation to challenge the introduction of the forensic interview recording. This claim is also not supported by the record, and defendant has not established prejudice.

"Criminal defense counsel has the duty to investigate carefully all defenses of fact and of law that may be available to the defendant. [Citation.]" (*In re Hill* (2011) 198 Cal.App.4th 1008, 1016.) The California Supreme Court "has made clear the right of a criminal defendant to expect not just that his counsel will undertake those actions that a reasonably competent attorney would undertake, but as well 'that before counsel undertakes to act at all he will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation.'" (*People v. Jones* (2010) 186 Cal.App.4th 216, 238, quoting *People v. Ledesma* (1987) 43 Cal.3d 171, 215, italics omitted.) However, we must "defer[] to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance." (*People v. Mai*, *supra*, 57 Cal.4th at p. 1009.) On direct appeal, defendant has the burden to demonstrate that "the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission . . . ." (*Ibid*; see also *People v. Vines*, *supra*, 51 Cal.4th at pp. 875-876.)

Defendant argues that trial counsel's failure to provide

statements from the proposed witnesses until the eve of trial demonstrates "rushed eleventh-hour minimum trial preparation." He contends that counsel failed to anticipate the possibility that the trial court would exclude their testimony. He also argues that trial counsel failed to prepare by assuming the forensic interview would not be admitted into evidence. However, defendant fails to establish that the record affirmatively discloses no rational tactical purpose for these actions. (See *People v. Mai*, *supra*, 57 Cal.4th at p. 1009; see also *People v. Vines*, *supra*, 51 Cal.4th at pp. 875-876.) There are several possible and reasonable strategies that explain trial counsel's actions. It is possible that counsel was unaware of the proposed witnesses or their significance until defendant raised the issue. Trial counsel may have determined that the proposed witnesses' testimony was not essential and only marginally relevant to the defense, which was focused on questioning the credibility of the testifying victim. Counsel may have belatedly provided the witness statements in order to avoid a thorough litigation of their admissibility, knowing that the proposed testimony would likely be excluded if heavily scrutinized. Because the record does not demonstrate that there is no rational explanation for counsel's actions or omissions, defendant fails to establish deficient performance. (See *People v. Mai*, at p. 1009; see also *People v. Vines*, at pp. 875-876.)

With regard to the forensic interview, defendant has similarly failed to establish a prima facie case of deficient performance. Defendant argues that his counsel's objections to the forensic interview based on *Crawford* and Evidence Code section 1360 were erroneous, "petty," and "beneath a lawyer practicing at this level." He contends that trial counsel "should

have known that the forensic interview would be played for the jury and prepared accordingly." However, the record before us does not support defendant's characterizations of trial counsel's performance. When the prosecutor used the interview transcript to refresh M.B.'s recollection, trial counsel protested that he never had a copy of the transcript. But the prosecutor subsequently indicated that the parties had corresponded regarding the admissibility and use of the interview months prior to trial. It appears that trial counsel was simply arguing to exclude the interview rather than assuming it would be inadmissible. On this record, defendant cannot demonstrate deficient performance.

Even assuming that defendant could establish trial counsel's deficient performance with respect to his investigation and preparation for trial, defendant has not demonstrated prejudice. The proposed defense witness testimony was not excluded because of any late discovery but rather because the court found the statements to be irrelevant or barred by the Rape Shield Law. Similarly, even if trial counsel assumed the forensic interview was inadmissible, he still had the opportunity to cross-examine M.B. at length. Trial counsel had no specific answer for the court when asked what additional questions he would have asked M.B. had he known the interview was going to be admitted. Under these circumstances, defendant cannot show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*People v. Williams*, *supra*, 16 Cal.4th at p. 215.)

**IV**

Defendant contends that trial counsel rendered ineffective assistance by failing to present expert witness testimony,

specifically a police practices expert or psychologist with experience in child molestation cases to opine that M.B. was inappropriately coached into making false allegations. We decline to second-guess this tactical choice by trial counsel and find that defendant has failed to show prejudice based on the lack of expert witness testimony.

Although an attorney *may* present expert testimony to assist the jury, there is "no support for the claim that expert testimony must be presented by a defense attorney in *every case* . . . ." (*People v. Datt* (2010) 185 Cal.App.4th 942, 952.) "The decision whether to call certain witnesses is a 'matter[] of trial tactics and strategy which a reviewing court generally may not second-guess. [Citation.]'" (*People v. Carrasco* (2014) 59 Cal.4th 924, 989.) The record does not disclose whether trial counsel consulted potential expert witnesses, or whether counsel made the tactical decision to forego calling an expert witness because he determined that cross-examining the testifying victim and the prosecution's witnesses would be more effective. Defendant has not demonstrated there was no rational tactical purpose for trial counsel's decision and thus cannot establish deficient performance. (See *People v. Mai*, *supra*, 57 Cal.4th at p. 1009; see also *People v. Vines*, *supra*, 51 Cal.4th at pp. 875-876.)

Moreover, defendant fails to show a reasonable probability that he would have achieved a more favorable verdict if his trial counsel had presented expert testimony. He merely asserts that a police practices expert would have been "helpful" and a psychologist would have been "invaluable." Defendant does not indicate what such experts would have testified to if called at trial. Nor does he demonstrate how such testimony could have undermined the prosecution's case given M.B.'s consistent

testimony and the corroborating physical evidence.

**V**

Defendant also argues that trial counsel rendered ineffective assistance by "permitting" defendant to testify. However, a criminal defendant has the right to testify even if his decision is contrary to the advice of counsel. (*People v. Robles* (1970) 2 Cal.3d 205, 215; accord *People v. Bradford* (1997) 15 Cal.4th 1229, 1332.) The record suggests that defendant chose to testify on his own behalf. During a pretrial hearing, trial counsel stated that defendant "wants to testify" at trial. Thus, the issue is not whether trial counsel "permitted" defendant to testify, but rather whether defendant chose to do so regardless of his counsel's advice. If defendant intends to assert that trial counsel rendered ineffective assistance by *advising* him to testify, that claim must fail. There is simply no indication in the record that counsel advised defendant regarding whether to testify, and therefore defendant cannot meet his burden to show deficient performance. (See *People v. Mai*, *supra*, 57 Cal.4th at p. 1009; see also *People v. Vines*, *supra*, 51 Cal.4th at pp. 875-876.)

**VI**

Finally, defendant asserts that the cumulative effect of trial counsel's allegedly deficient performance was prejudicial and therefore warrants reversal. Prejudice may be demonstrated when numerous deficiencies in defense counsel's performance, considered in the aggregate, deprive a defendant of his constitutional right to a fair trial. (*In re Jones* (1996) 13 Cal.4th 552, 583-587.) But, as we have decided, no such prejudice has been shown in this case. Defense counsel's actions, taken either individually or in the aggregate, do not undermine confidence in the outcome of this trial.

## DISPOSITION

The judgment is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

EPSTEIN, P.J.

We concur:

WILLHITE, J.

MANELLA, J.