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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CARLOS DELATORRE, Defendant and Appellant.	B230591 (Los Angeles County Super. Ct. No. VA112243)

APPEAL from a judgment of the Superior Court of Los Angeles County, Phillip H. Hickok, Judge. Affirmed.

Paul Richard Peters; and Lawrence R. Young for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Carlos Delatorre, appeals the judgment entered following his conviction for two counts of forcible lewd act on a child, and two counts of forcible oral copulation, with a finding the crimes involved multiple victims (Pen. Code, §§ 288, subd. (b)(1), 288a, subd. (c)(2), 667.61).[1] He was sentenced to state prison for a term of 100 years to life.

The judgment is affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

D.P. testified that in 1999 he had his hair cut by defendant Delatorre, who owned Carlos Hair Salon in Bellflower. At the time, D.P. was 13 years old. Delatorre did not charge for the haircuts and he gave D.P. free hair products and services. During the haircuts, however, Delatorre would fondle D.P.'s penis over his clothing. On one occasion, Delatorre took D.P. into the back of the salon and orally copulated him. Delatorre masturbated D.P. and asked him to put his penis into Delatorre's anus, which D.P. did.

D.P. was not cooperative with the police during the early stages of the investigation because he was embarrassed. At one point he even lied to the police by saying nothing had happened between him and Delatorre. D.P. denied "making out" with other boys in Delatorre's salon; D.P. considered himself heterosexual. He also denied having stolen any money from Delatorre.

R.S. was D.P.'s friend. He and D.P. would pass by Delatorre's hair salon in 1999 when they walked home from school. At the time, R.S. was 13 years old. When Delatorre cut R.S.'s hair, he never charged him, and he gave R.S. other free hair

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

services and products. During the haircuts, Delatorre would fondle R.S.'s penis over his clothing.

One day, Delatorre told R.S. and D.P. they owed him for the hair products he had given them. He locked the boys inside the salon and threatened to tell the police they had stolen from him. Delatorre then took D.P. into a back room. Twenty minutes later, D.P. emerged from the room with a "shocked" look on his face. Delatorre then called R.S. into the back room and told him to pull his pants down. R.S. heard Delatorre squeezing lubricant out of a bottle and felt him apply it to his anus. Delatorre then penetrated R.S. anally four or five times. R.S. testified it hurt a lot; it felt "like being pulled open, like ripped." Delatorre then put both boys on a couch and sat between them. He masturbated and orally copulated them. Delatorre threatened to hurt them if they told anyone. R.S. never returned to the salon.

R.S. testified he was sexually attracted to girls, not boys, when he was 13. He never kissed or fondled another boy in front of Delatorre. He waited ten years to report the abuse, but ultimately felt compelled to do so because he knew Delatorre was still in the same city and "there could be more children out there."

Detective Scott McCormick of the Los Angeles County Sheriff's Department testified Delatorre gave police a statement. As to D.P., Delatorre "admitted . . . masturbating him, orally copulating him, digitally penetrating [D.P.]'s anus with his fingers, and . . . having [D.P.] sodomize him." Delatorre admitted locking the doors of the salon with D.P. inside. As to R.S., Delatorre "admitted to masturbating [R.S.] and orally copulating" him. Delatorre acknowledged he knew the boys were minors. McCormick testified Delatorre "minimize[d] his conduct considerably" during the interview and "blame[d] [R.S.] and [D.P.] for what occurred," saying it was "their fault, he's the victim here."

2. *Defense evidence.*

Delatorre testified he recalled R.S. and D.P. coming to his salon in 1999, and that he gave them free haircuts. The boys acted "[c]ompletely gay" toward him and sometimes stole his money.

Delatorre denied ever having had any sexual contact with R.S. He lied to the police about engaging in a sexual act with R.S. because he felt pressured and intimidated during the police interview.

Delatorre admitted having masturbated D.P. one time at the salon. Delatorre testified D.P. came in "for a haircut one day, and he had money his mother had given him to cut his hair. And then he said, 'Don't charge me.' And he said, 'I'll come back when you close the business.' And I said, 'Okay, come back when you're ready.' I was going to leave the salon, and he said, 'Let's go inside. Let's go inside.' It was at that particular day that he told me to put my hand on his anus. And I said, 'No. No, no, no.' I closed the door of the salon, and I said, 'Let's leave.' I put him on the bed so I could give him a facial. He took out his penis, and I masturbated him. That was all that happened."

Delatorre believed D.P. was 14 or 15 years old at the time. The salon door was locked when this incident occurred, but that was only because it was after the shop had closed for the day. Delatorre denied pressuring D.P. to engage in sex. Delatorre falsely told the police he and D.P. had engaged in anal sex because he was intimidated by Detective Dennis Blackstock.

Several witnesses testified they had known Delatorre for many years and considered him honest and truthful.

Delatorre's sister, Sara, testified she worked at the salon during 1999 from 10:00 a.m. until 6:00 p.m. She denied having ever seen D.P. or R.S. there.

3. *Rebuttal evidence.*

Detective McCormick testified he had interviewed Delatorre before Detective Blackstock interviewed him. Delatorre initially denied there had been any sexual activity with either boy, but then admitted masturbating and orally copulating D.P. It wasn't until the following day that Delatorre admitted having had anal intercourse with D.P. and having sexually touched R.S. Delatorre admitted "he had taken advantage of the situation at the hair salon with the boys."

CONTENTIONS

1. Delatorre's statements to the police should have been excluded from evidence.

2. There was ineffective assistance of counsel.

DISCUSSION

1. *Delatorre's police statements were properly admitted.*

Delatorre contends his convictions must be reversed because the trial court improperly admitted inculpatory statements he made during his police interviews. This claim is meritless.

a. *Background*.

Delatorre moved to suppress the inculpatory statements he made to the police on two grounds: he had not been given a *Miranda*[2] warning at the beginning of Detective McCormick's questioning, and he had not been provided with a Spanish interpreter by either detective.

At an evidentiary hearing, McCormick testified he interviewed Delatorre in English. At the beginning of the interview they were just speaking casually and McCormick was only trying to establish a rapport with Delatorre. But when their conversation turned to the child molesting accusations, McCormick realized he had forgotten to give Delatorre a *Miranda* warning: "The conversation began, we began talking, a rapport was built, and it wasn't until some facts started to come out that I realized I had forgotten to *Miranda*. That's why I stopped the interview then, made the *Miranda* advisement, and made sure he waived before we continued." McCormick denied having deliberately delayed the *Miranda* advisement until Delatorre made inculpatory statements.

McCormick testified Delatorre appeared to understand everything McCormick was saying. McCormick, who does not speak Spanish, testified that if, at any point, he

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602].

had felt Delatorre was not following the conversation he would have "stopped the interview and gotten the services of an interpreter."[3]

"Q. Okay. [¶] Now, in regard to Mr. Delatorre's *Miranda* rights. You said that you felt comfortable speaking to him in English, right?

"A. Correct.

"Q. You felt that he was understanding everything; is that right?

"A. Absolutely."

"Q. Did the defendant ever tell you that Spanish was his primary language?

"A. He said he was more comfortable in Spanish, but he understood English.

"The Court: He told you that?

"A. Yes."

The trial court suppressed the portion of McCormick's interview that had been conducted prior to the *Miranda* warning, but admitted the remainder.

b. *Delatorre's statement was not tainted by the delayed Miranda warning.*

Delatorre contends that, in addition to his pre-*Miranda* statements, the subsequent statements he made to Detective McCormick as well as all the statements he made to Detective Blackstock the following day should have been suppressed because they were tainted by the *Miranda* violation. Not so.

"In *Oregon v. Elstad* (1985) 470 U.S. 298 [105 S.Ct. 1285, 84 L.Ed.2d 222] (*Elstad*), the high court considered whether a suspect's voluntary incriminating statement in custody, made pursuant to a waiver of *Miranda* rights, was nonetheless inadmissible because it followed an earlier incriminating statement obtained by custodial questioning without a *Miranda* warning. Finding that the subsequent statement need not be excluded, the *Elstad* majority held that (1) a *Miranda* violation does not require full application of

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[3] McCormick testified, "If somebody is I feel comfortable and understanding an English conversation with me, I prefer to do it in English. It's just an easier interview for me versus going through an interpreter. If I believe that they are not going to understand me in English, or I'm not going to be able to understand them in English, that's when I go to an interpreter."

the . . . 'fruit of the poisonous tree' doctrine developed for Fourth Amendment violations; (2) instead, if an unwarned custodial statement was otherwise voluntary, a later statement must be deemed untainted if also voluntary *and* in compliance with *Miranda*; and (3) in determining whether the second statement was voluntary, the suspect's awareness that he had already 'let the cat out of the bag' is not dispositive." (*People v. Storm* (2002) 28 Cal.4th 1007, 1028-1029.)

The reason for this rule is that "the Fifth Amendment, at bottom, protects against *compelled* testimonial self-incrimination. *Miranda* and its progeny are designed to allow *full understanding and exercise* of this constitutional right in the inherently custodial atmosphere of police custody. However, '[t]he failure of police to administer *Miranda* warnings does not mean that the statements received have actually been coerced, but only that courts will presume the privilege against compulsory self-incrimination has not been intelligently exercised. [Citations.]' [Citation.] Thus, such statements must be excluded even if they were '*otherwise voluntary* within the meaning of the Fifth Amendment.' [Citation.] [¶] But it does not follow that the *fruits* of such an 'otherwise voluntary' statement are invariably tainted and inadmissible." (*People v. Storm, supra,* 28 Cal.4th at p. 1029.)

"Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." (*Berghuis v. Thompkins* (2010) 130 S.Ct. 2250, 2262 [176 L.Ed.2d 1098].) "As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford. [Citations.]" (*Ibid*.) "The *Miranda* rule and its requirements are met if a suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions." (*Id*. at p. 2263.)

Delatorre made no showing at the evidentiary hearing that any of his admissions had been tainted by the delayed *Miranda* warning. Delatorre did not testify at the

hearing. Indeed, he did not even ask the trial court to make a finding that any of his statements had been coerced. Delatorre merely asked the trial court to exclude his pre-*Miranda* statements, which the trial court did. In essence, the coercion issue has been waived. (See *People v. Ray* (1996) 13 Cal.4th 313, 339 ["No question of a death penalty 'guarantee' or other improper inducement was mentioned in defendant's suppression motion or argued at the hearing. As a result, the parties had no incentive to fully litigate this theory below, and the trial court had no opportunity to resolve material factual disputes and make necessary factual findings. Under such circumstances, a claim of involuntariness generally will not be addressed for the first time on appeal."]; *People v. Clark* (1993) 5 Cal.4th 950, 988, fn. 13, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [where defendant did not, at the suppression hearing, allege coercive police questioning he could not raise the issue on appeal].)

Delatorre also argues the delayed *Miranda* warning constituted the kind of "question-first" technique condemned by *Missouri v. Seibert* (2004) 542 U.S. 600 (124 S.Ct. 2601).[4] Not so.

Seibert condemned an interrogation tactic in which a suspect is *intentionally* interrogated without a *Miranda* warning in the hope incriminating statements will be made. If they are, *Miranda* is then given and the interrogation continues with the aim of re-eliciting the same incriminating statements: "This case tests a police protocol for custodial interrogation that calls for giving no warnings of the rights to silence and counsel until interrogation has produced a confession.[5] Although such a statement is

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[4] Delatorre asserts: "The telling testimony is that of Detective McCormick . . . that he forgot to give the warning at the beginning. The question then becomes, should [the] police be aided by the failure to conveniently 'forget' to give the warning and then be able to use any admissions that a defendant provides them afterward. Clearly, anything that flows from that failure is the 'fruit from the poisonous tree' and likewise should be suppressed."

[5] The police officer in *Seibert* "testified that he made a 'conscious decision' to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been taught: question first, then give the warnings, and then repeat the question 'until I get the

generally inadmissible, since taken in violation of *Miranda* . . . , the interrogating officer follows it with *Miranda* warnings and then leads the suspect to cover the same ground a second time. The question here is the admissibility of the repeated statement. Because this midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with *Miranda*'s constitutional requirement, we hold that a statement repeated after a warning in such circumstances is inadmissible." (*Missouri v. Seibert, supra,* 542 U.S. at p. 604.)

As the Attorney General points out, however, the situation here is quite unlike *Seibert* because Detective McCormick testified his *Miranda* advisement had been delayed *unintentionally*. Hence, because the record shows Delatorre's "unwarned custodial statement was otherwise voluntary," and his "later statement [was] untainted [because it was] also voluntary *and* in compliance with *Miranda*" (*People v. Storm, supra,* 28 Cal.4th at pp. 1028-1029), the trial court was not required to suppress any more of Delatorre's statements than it did.

c. *Delatorre's statement was not tainted by the lack of a Spanish interpreter.*

Delatorre contends all of his police statements should have been suppressed because, even after telling the detectives he was more comfortable speaking Spanish, they gave him the *Miranda* warnings in English, which violated his right to an interpreter under the California Constitution. This claim is meritless.

"Article I, section 14 of the California Constitution grants to non-English-speaking criminal defendants the distinct right to an interpreter 'throughout the proceedings.' It provides in pertinent part: 'A person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings.' (Cal. Const., art. I, § 14.) The provision was adopted in 1974. Prior to enactment of this constitutional provision, courts had developed the rule that upon the defendant's showing of necessity,

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answer that she's already provided once.' " (*Missouri v. Seibert, supra,* 542 U.S. at pp. 605-606.)

appointment of an interpreter was required as a matter of due process. [¶] In the past, trial courts had been afforded broad discretion in determining whether a defendant's comprehension of English was minimal enough to render interpreter services 'necessary.' [Citations.] Nothing in the new constitutional provision changes this well established requirement of a finding of necessity by the trial court. Indeed, the provision specifically states that the right to an interpreter is contingent upon a person's being 'unable to understand English.' (Cal. Const., art. I, § 14.) Prior to the right being spelled out in the state Constitution, the court's failure to appoint an interpreter upon a proper showing of need was deemed violative of fundamental fairness and sometimes required reversal of the defendant's conviction. [Citation.]" (*People v. Carreon* (1984) 151 Cal.App.3d 559, 566-567.)

It is doubtful the constitutional right applied here because Delatorre's interrogation was not part of a judicial proceeding. (See *People v. Gutierrez* (1986) 177 Cal.App.3d 92, 100 [Cal. Const., art. I, § 14, did not apply to probation interview for presentence report because that was not "a proceeding held before a judicial tribunal"].) But in any event, Delatorre failed to carry his burden of demonstrating he could not understand English.

"[W]hen the ability of one charged with a crime to understand English is being evaluated at the outset of the proceedings, the burden is on the accused to show that his understanding of English is not sufficient to allow him to understand the nature of the proceedings and to intelligently participate in his defense." (*In re Raymundo B.* (1988) 203 Cal.App.3d 1447, 1454.) "The prerequisite to an appointment of an interpreter is, therefore, that the person charged with a crime be 'unable to understand English,' not that he demand an interpreter. While the fact that the person who has been charged with a crime states that he does not understand English and requests an interpreter on that basis may be some evidence of the fact that the charged individual does not understand English, it cannot be considered conclusive proof of that lack of proficiency in English." (*Id*. at p. 1453.) "The fact that an interpreter had been provided for a defendant in certain prior proceedings was just one factor to be evaluated. As long as there was other

evidence before the lower court that indicated the defendant did, in fact, understand English, a decision of the lower court denying the appointment of an interpreter will be upheld." (*Id*. at p. 1456.) Moreover, the usual rule applies that "it is the appellant's burden to provide an adequate record on appeal." (*Id*. at p. 1452.)

Hence, Delatorre was not entitled to an interpreter merely because he requested one, nor is the fact an interpreter was subsequently used at trial dispositive. There was certainly evidence in the record showing Delatorre did not need an interpreter. McCormick testified he made a determination Delatorre could understand English "based upon the conversation I was having with him. He clearly appeared to understand me. He answered my questions in an appropriate manner, he asked appropriate questions of me, I could understand him. That's why I continued in English." McCormick also testified Delatorre *said* he understood English, although he was more comfortable speaking Spanish. Moreover, the definitive evidence on this point might well have been the transcripts of the police interviews, but Delatorre has failed to make these transcripts part of the appellate record. (See *People v. Akins* (2005) 128 Cal.App.4th 1376, 1385 ["It is axiomatic that it is the burden of the appellant to provide an adequate record to permit review of a claimed error, and failure to do so may be deemed a waiver of the issue on appeal."].)

We agree with the Attorney General that Delatorre "did not carry his burden of demonstrating that he failed to understand English to such an extent as to trigger the constitutional right to an interpreter."

2. *Delatorre was not denied effective assistance of counsel.*

Delatorre contends he was denied the effective assistance of counsel at trial. This claim is meritless.

a. *Legal principles.*

A claim of ineffective assistance of counsel has two components: " 'First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show

that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' [Citation.] To establish ineffectiveness, a 'defendant must show that counsel's representation fell below an objective standard of reasonableness.' [Citation.] To establish prejudice he 'must show that 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.]" (*Williams v. Taylor* (2000) 529 U.S. 362, 390-391.) "[T]he burden of proof that the defendant must meet in order to establish his entitlement to relief on an ineffective-assistance claim is preponderance of the evidence." (*People v. Ledesma* (1987) 43 Cal.3d 171, 218.)

"[I]f the record sheds no light on why counsel acted or failed to act in the challenged manner, we must reject the claim on appeal unless counsel was asked for an explanation and failed to provide one, or there could be no satisfactory explanation for counsel's performance. [Citation.]" (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015.) An appellate court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." (*Strickland v. Washington* (1984) 466 U.S. 668, 697.)

"Where the record shows that the omission or error resulted from an informed tactical choice within the range of reasonable competence, we have held that the conviction should be affirmed." (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1215; see *People v. Mitcham* (1992) 1 Cal.4th 1027, 1059 [decision whether to put on witnesses is "matter[ ] of trial tactics and strategy which a reviewing court generally may not second-guess"].) "It is not sufficient to allege merely that the attorney's tactics were poor, or that the case might have been handled more effectively. [Citations.] [¶] Rather, the defendant must affirmatively show that the omissions of defense counsel involved a critical issue, and that the omissions cannot be explained on the basis of any knowledgeable choice of tactics." (*People v. Floyd* (1970) 1 Cal.3d 694, 709, disapproved on other grounds by *People v. Wheeler* (1978) 22 Cal.3d 258, 287, fn. 36.)

b. *Alleged error characterizing People's burden of proof.*

Delatorre contends defense counsel was ineffective for failing to object when the trial court mischaracterized the People's ultimate burden of proof in a criminal trial. This claim is meritless.

During introductory remarks to the jury before opening statements or the taking of any evidence, the trial court read the criminal information which had been filed against Delatorre and then said: "To these charges Mr. Delatorre has pled not guilty. He says, no, I did not do it. We are now here to have a trial to see whether or not there's a sufficient amount of evidence that can be produced to convince you that he is guilty, or to convince you that he is not guilty of these crimes." Delatorre argues he was prejudiced by defense counsel's failure to object to this erroneous statement implying a criminal defendant had some burden to prove his own innocence.

We conclude there could not have been any prejudice. The prosecution's true burden of proof was thereafter correctly and thoroughly explained to the jury *both* in the trial court's immediately following introductory remarks, *and* at the close of trial when the court formally read out the official jury instructions.

Immediately following its erroneous statement, the trial court went on to say: "We have a federal, and we have a state constitution which guarantees to all of you, to all of us, certain rights. One of those rights is the right to have a jury trial if . . . you're accused of committing a crime. Many other countries, if you're accused of committing a crime, you're found guilty until you prove yourself innocent. You're in jail, and you're never going to get out. Here, it's the other way around. *If you're accused of a crime, the state has to prove that you did that crime. You don't have to prove a thing. You're entitled to come in here and have a jury decide if there is enough evidence to find you guilty.* [¶] Mr. Delatorre is here for that reason. There are other rights he has, and you have, too. *He has a right not to say anything if he doesn't want to*. If he doesn't want, he and his attorney can sit here and do crossword puzzles, or read the newspaper throughout the trial. They don't have to say a word. *The reason for this is that the district attorney, the People, they have a burden of proving the guilt [of] Mr. Delatorre.* Not only do they

have the burden of bringing in evidence showing his guilt, they have to bring in so much evidence that you are convinced beyond a reasonable doubt that he did, in fact, commit these crimes." (Italics added.)

Then, at the close of all the evidence, the trial court instructed the jury with CALCRIM No. 220, the standard instruction explaining the concept of reasonable doubt. "The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial. [¶] *A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt*. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. *Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty*." (Italics added.)

It is true that prejudicial error has sometimes been found when a trial court offers unscripted commentary in a mistaken attempt to explain the mysteries of "reasonable doubt." (See, e.g., *People v. Johnson* (2004) 115 Cal.App.4th 1169, 1172 [reversal required where trial court said "people planning vacations or scheduling flights engage in a deliberative process to the depth required of jurors[,] or that such people finalize their plans only after persuading themselves that they have an abiding conviction of the wisdom of the endeavor"].) But this is an entirely different situation. The trial court here was not trying to clarify the meaning of reasonable doubt. Rather, it was merely making general, introductory remarks about the forthcoming trial, and the remarks it made immediately thereafter clearly informed the jurors that Delatorre was not required to prove anything. Moreover, when it delivered the actual jury instructions, the trial court

simply gave the standard instruction defining the People's burden of proof without any emendation or commentary.

Because there could have been no resulting prejudice, this ineffective assistance of counsel claim fails.

c. *Opening statement errors.*

Delatorre contends defense counsel was ineffective because some of the remarks during his opening statement to the jury served only to prejudice the defense. This claim is meritless.

(1) *Admitting the molestations occurred.*

Delatorre argues defense counsel admitted acts of child molestation did take place by saying: "You'll hear that [R.S.] told somebody named Debbie M[.], she was an adult, and she was his mother's good friend . . . . [A]pparently [R.S.] told Debbie M[.] about this, about four years after it happened. So we're probably talking about 2003, 2004. Yet . . . [R.S.] never came to the police or told his own parents until 2009. And you'll hear testimony that he told Ms. [M] about it as early as 2003, 2004."

But as the Attorney General points out, defense counsel did not make any admissions here; he merely advised the jury what he expected R.S. to say based on R.S.'s preliminary hearing testimony.

(2) *Multiple victims.*

Similarly, Delatorre complains defense counsel alerted the jury to the fact there were two alleged victims by saying: "Now, what you'll hear also is the way this came up is R.S. ultimately . . . was having problems. And you'll hear him describe the problems he was having, whether it be psychiatric, or psychological, or emotional, or mental problems he will describe for you. And he then, in some way, had contact with police as an adult. He indicated what had happened to him, and described that they should contact D.P. Talk to D.P. about this." Delatorre argues these comments served to "set in the mind of the jury that there were two victims and thus, the Defendant would be shown to be guilty of [the multiple victim enhancement set forth in] Section 667.61."

Again, no admissions were made. Defense counsel was merely describing how the case had first been brought to the attention of the police. Moreover, the jury had already been advised by the trial court's reading of the information that Delatorre had been charged with molesting two victims.

(3) *References to Delatorre's "admissions and confessions."*

Delatorre complains defense counsel conceded Delatorre's guilt by referring to the "admissions and confessions" he made to the police. But here is the context in which the reference was made: "You'll hear that when the police interviewed Mr. Delatorre with, again Spanish being his primary language, while he can speak in English, you'll hear Mr. Delatorre talked about the fact that he has a hard time. He can speak it, but he has a hard time understanding it when it's said to him. You'll hear about the fact that in parts of his interview he talks about the fact that he indicated to Detective McCormick that Spanish was his primary language, and that he said he would better understand the interview if it was done in Spanish. He would feel more comfortable if the interview was done in Spanish. You'll hear testimony in this case that the interview was not done in Spanish, it was done in English. So this interview that includes these admission or confessions by Mr. Delatorre was done entirely in English, never offered a Spanish language interpreter even though one was available in the facility where he was at."

Again, defense counsel was merely alluding to evidence he knew the jury was going to hear. And, as the Attorney General argues, defense counsel was apparently "set[ting] up the argument that any statements made by his client should be viewed with caution as English was not his primary language." We would also note defense counsel had a client who was going to take the stand and admit to at least one of the charged acts of molestation.

d. *Failure to call expert witness.*

In his opening statement, defense counsel told the jury it would hear the testimony of a psychologist who had examined Delatorre. On appeal, Delatorre complains defense counsel ultimately failed to call this witness even though she would have given the very crucial testimony that he was a gay man who engaged in sex with men his own age, and

that he "was not diagnosable with pedophilia and has no personality disorder that involves predatory components."

But the record reveals defense counsel apparently decided not to call the psychologist after discovering Delatorre had misrepresented to her the nature of a prior conviction he had suffered.[6] When the prosecution indicated it would ask the psychologist if this information would have changed her opinion about Delatorre, defense counsel told the trial court he had decided not to call the psychologist as a witness.

"[T]he choice of which, and how many, of potential witnesses [to call] is precisely the type of choice which should not be subject to review by an appellate court." (*People v. Floyd, supra*, 1 Cal.3d at p. 709.) The Attorney General argues defense counsel made just such a tactical decision here. In his reply brief, Delatorre does not dispute this assertion, but appears to argue defense counsel should have called the psychologist to testify that the information would not have altered her diagnosis. That she would have done so, however, is pure speculation on Delatorre's part.

e. *Failure to file written brief.*

Delatorre complains defense counsel failed to file a written brief in support of the "fruit of the poisonous tree" *Miranda* theory, arguing this inadequacy led the trial court to admit some of the police statements. But, as discussed *ante*, the fruit of the poisonous tree doctrine was inapplicable in this situation. Defense counsel "is not required to make futile motions or to indulge in idle acts to appear competent" (*People v. Torrez* (1995) 31 Cal.App.4th 1084, 1091.)

We conclude Delatorre has failed to show any ineffective assistance of counsel.

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[6] Apparently Delatorre had a prior conviction for lewd conduct based on his having solicited prostitution, but Delatorre told the psychologist he had been convicted for urinating in public.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.