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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA ALEXANDER RODRIGUEZ, Defendant and Appellant.	2d Crim. No. B278435 (Super. Ct. No. 1442051) (Santa Barbara County)

Joshua Alexander Rodriguez pled no contest to one count of child abuse (Pen. Code,[1] § 273a, subd. (a)), and admitted an allegation that he inflicted great bodily injury on a child under the age of five (§ 12022.7, subd. (d)). He admitted a prior serious felony conviction (§ 667, subd. (d)(1)) and a prior prison term (§ 667.5, subd. (b)). The trial court sentenced him to 18 years in state prison: the middle term of four years on the child abuse conviction, doubled because of the prior serious felony conviction

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

(§ 667, subd. (e)(1)); a consecutive five years on the great bodily injury allegation; and another consecutive five years on the serious felony enhancement (§ 667, subd. (a)(1)).

Rodriguez filed a request for a certificate of probable cause (§ 1237.5), which the trial court granted. He contends counsel provided ineffective assistance at various stages of the proceedings. We affirm.

FACTUAL AND PROCEDURAL HISTORY

Police arrested Rodriguez after he dropped and fell on his infant daughter, E.R., fracturing her skull. He retained attorney Martin Cohn to represent him. During the course of Cohn's representation, the prosecution offered to recommend a sentence of 18 years, which Rodriguez declined. Cohn filed a *Romero*[2] motion on Rodriguez's behalf. The trial court refused to rule on the motion prior to hearing evidence at the preliminary hearing.

Attorneys Gregory Bentley and Curtis Briggs later substituted in for Cohn. Over the next three months, Bentley failed to appear in court several times. The trial court ordered Bentley to show cause why he should not be held in contempt. At a subsequent appearance, Bentley stated he received all discovery from the prosecution and was "prepared to go forward" with the preliminary hearing. The court set both it and the contempt hearing for the following month.

Bentley requested another continuance when he appeared for the preliminary hearing, which the trial court denied. At the conclusion of the hearing, the court held

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[2] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

Rodriguez to answer and found true the great bodily injury allegation.

At trial call, Briggs moved to continue trial for three months because he had given Rodriguez's case "very little attention." Though he spoke with Rodriguez and his family members and conducted field investigations, he had not engaged experts or an investigator and had not subpoenaed documents. Briggs also stated that Bentley was unprepared for Rodriguez's preliminary hearing because he was focused on the contempt action against him. The trial court granted the motion, finding that Rodriguez "ha[d] to date received ineffective assistance of counsel not through anything that he'[d] done or not done."

On the day of trial, Briggs filed another *Romero* motion, and said Rodriguez wanted to plead open to the charge. The prosecutor reiterated the 18-year offer. Before accepting his plea, the trial court told Rodriguez he could be sentenced to up to 23 years in prison. Rodriguez said he understood, and pled no contest to the child abuse charge, admitted the great bodily injury allegation, and admitted the prior serious felony conviction and prior prison term allegations.

Prior to sentencing, the probation officer filed a presentence report. The report detailed factors in aggravation and factors in mitigation. It recommended a sentence of 23 years.

Five of Rodriguez's friends and family members spoke on his behalf at sentencing. Briggs detailed several factors that, in his view, brought Rodriguez outside the scope of the "Three Strikes" law. The trial court considered these factors and sentenced Rodriguez to 18 years in state prison.

DISCUSSION

Rodriguez contends Bentley and Briggs provided ineffective assistance because of their untimely attempt to negotiate a plea bargain and inadequate representation at the preliminary hearing.[3] On this record, we disagree.

A defendant is entitled to "effective assistance of counsel at critical stages of a criminal proceeding." (*Lafler v. Cooper* (2012) 566 U.S. 156, 165; see *Coleman v. Alabama* (1970) 399 U.S. 1, 9-10 [preliminary hearings]; *McMann v. Richardson* (1970) 397 U.S. 759, 770-771 [plea negotiations].) To establish a claim of ineffective assistance of counsel, a defendant must prove, by a preponderance of the evidence, that counsel's performance was deficient and resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 691-692; *People v. Ledesma* (1987) 43 Cal.3d 171, 218.) As to the first requirement, we "defer to counsel's reasonable tactical decisions" and indulge "a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' [Citation.]" (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.) We will not find deficient performance unless no conceivable reason for counsel's actions appears on the record. (*People v. Cunningham* (2001) 25 Cal.4th

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[3] Rodriguez also claims Briggs was ineffective because he did not prepare for trial, erroneously advised him to enter an "open plea," and made various errors and omissions prior to and during sentencing. Because these claims require consideration of facts outside the record on appeal, we decline to consider their merits here. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267.) They are more appropriately raised in a petition for writ of habeas corpus. (*People v. Wilson* (1992) 3 Cal.4th 926, 936.) Rodriguez's petition for writ of habeas corpus (case No. B283826) is pending and will be decided by separate order.

926, 1003.) A defendant establishes prejudice by showing "'a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*Ibid*.) The defendant must "prov[e] prejudice as a 'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel. [Citation.]" (*People v. Williams* (1988) 44 Cal.3d 883, 937.)

An ineffective assistance of counsel claim fails on an insufficient showing of either deficient performance or prejudice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.) "[W]e undertake an independent review of the record [citation] to determine whether [Rodriguez] has established by a preponderance of substantial, credible evidence [citation] that his counsel's performance was deficient and, if so, that [he] suffered prejudice." (*In re Alvernaz* (1992) 2 Cal.4th 924, 944-945.)

Untimely attempt to negotiate a plea bargain

Rodriguez contends Bentley and Briggs were ineffective because they did not attempt to negotiate a plea before the court issued the holding order at the conclusion of the preliminary hearing, which prevented him from pleading to a nonserious felony. (§§ 859a, subd. (a) [defendant may plead guilty before holding order], 1192.7, subds. (a)(2) [with limited exceptions, no plea bargaining where information charges a serious felony] & (c)(8) [any felony where defendant inflicts great bodily injury is a serious felony].) We disagree.

Counsel has a "duty to investigate and pursue possible dispositions by way of plea." (*People v. Brown* (1986) 177 Cal.App.3d 537, 549.) This "includes the obligation to initiate plea negotiations where the facts and circumstances of the offense and its proof, as well as an assessment of available factual and legal defenses, would lead a reasonably competent

counsel to believe that there is a reasonable possibility of a result favorable to the accused through the process of plea negotiations." (*Ibid.*) If counsel does not undertake this duty, "a defendant must prove there is a reasonable probability that . . . the defendant would have accepted the proffered plea bargain and that in turn it would have been approved by the trial court." (*In re Alvernaz*, *supra*, 2 Cal.4th at p. 937.)

Neither Bentley nor Briggs attempted to negotiate a plea for Rodriguez until after the conclusion of the preliminary hearing. But even if that constitutes deficient performance, Rodriguez does not show prejudice because, on this record, there is no indication the prosecution or trial court would have agreed to a plea with a recommended sentence of less than 18 years. The prosecution's first offer, made prior to the preliminary hearing and rejected by Rodriguez, recommended a sentence of 18 years. The second offer, made on the eve of trial, again recommended a sentence of 18 years. And the court appeared reluctant to accept a plea with a recommended sentence of less than 18 years: It repeatedly declined to give an indicated sentence, and imposed the sentence recommended in the original plea. We cannot speculate that the prosecutor or court would have agreed to any other term. (*People v. Stephenson* (1974) 10 Cal.3d 652, 661; see *In re Alvernaz*, *supra*, 2 Cal.4th at p. 937.)

Inadequate representation at the preliminary hearing

Rodriguez contends Bentley provided ineffective assistance because he did not adequately prepare for or represent him at the preliminary hearing. But Rodriguez's "failure to raise the question of denial of effective representation by counsel at the preliminary hearing by motion under [section 995], precludes [him from] raising th[is] issue as grounds for reversal on appeal."

(*People v. Wilkins* (1967) 251 Cal.App.2d 823, 826; see § 996.) The contention is forfeited. (*People v. Wilkins*, at p. 826.)

Alternatively, Rodriguez claims Briggs provided ineffective assistance because he did not challenge Bentley's lack of preparation for the preliminary hearing in a pretrial petition for writ of prohibition. The record does not support this claim.

During the preliminary hearing, the prosecution put forth evidence that E.R.'s head injuries required substantial force. At first, Rodriguez claimed E.R. was injured when she rolled off his chest and onto the floor after he fell asleep on the couch. Experts refuted that a fall from such a short distance could cause E.R.'s injuries. Rodriguez later admitted that he dropped E.R. onto the floor and then fell on her, "dropping the full weight of his body on her head." He had been drinking and had taken medication that causes drowsiness when the incident occurred.

Bentley called no witnesses, put on no evidence, and presented no closing argument at the preliminary hearing. But he did make evidentiary objections, several of which were sustained. He cross-examined four of the five witnesses, and elicited some favorable testimony.

Rodriguez does not show that Briggs performed deficiently when he did not challenge Bentley's performance at the preliminary hearing because there is a "strong possibility that [he] simply decided as a tactical matter that nothing would be served by going through another preliminary hearing (particularly in light of the strength of the evidence upon which [Rodriguez] was held to answer)." (*People v. Phillips* (1985) 41 Cal.3d 29, 61.) The evidence against Rodriguez was substantial, and the standard at a preliminary hearing is "exceedingly low"

(*Salazar v. Superior Court* (2000) 83 Cal.App.4th 840, 846); all that is required is "some rational basis for assuming the possibility that [the defendant] committed an offense" (*Thompson v. Superior Court* (2001) 91 Cal.App.4th 144, 149, fn. 4). Rodriguez does not specify how additional cross-examination, witnesses, evidence, defenses, or closing argument would have prevented the prosecution from meeting this standard. We cannot fault Briggs for forgoing an exercise in futility. (*People v. Phillips*, at p. 61.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Jean M. Dandona, Judge

Superior Court County of Santa Barbara

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