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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DAVID ANTHONY ORTEGA, Defendant and Appellant.	B282080 (Los Angeles County Super. Ct. No. VA140870)

APPEAL from a judgment of the Superior Court of Los Angeles County, Raul A. Sahagun, Judge. Affirmed.

Brad Kaiserman, under appointment by the Court of Appeal, and David Ortega, in pro. per, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

David Anthony Ortega appeals from the judgment entered following his guilty plea to one count of second–degree robbery (Pen. Code, § 212.5, subd. (c),[1] and his admission of a gang allegation (§ 186.22, subd. (b)(1)(c)). Appellant's appointed counsel filed a brief under *People v. Wende* (1979) 25 Cal.3d 436, 441 (*Wende*), raising no issues, and asked this court independently to review the record. Appellant filed a supplemental brief. He contends that: (1) the prosecution failed to disclose material information regarding anticipated trial testimony of a prosecutorial witness; (2) he received ineffective assistance of counsel; and (3) the trial court violated his constitutional rights under the sixth and fourteenth amendments by denying a continuance, leaving appellant with "no choice but to go to trial with [an ineffective] lawyer."

FACTUAL AND PROCEDURAL BACKGROUND

At about 3:30 a.m. on December 27, 2015, Galilea Campuzano was at a bus stop. A silver car, driven by a woman, pulled up. Appellant was in the passenger seat. He asked Campuzano–who had multiple convictions for prostitution–if she was working. When Campuzano asked appellant what he meant, he got out of the car and pointed a handgun at her. She tried to spray him with pepper spray. Appellant told Campuzano she "had to pay him if [she] was working there,"

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1 Statutory references are to the Penal Code.

"[b]ecause [he was] from Florencia [gang] and here [she had] to pay rent." That point was reinforced by the female driver of the car who told Campuzano "You have to pay rent, you bitch." Appellant and the woman told Campuzano that if she "didn't pay they would come back in a little while," and drove off.

Campuzano watched the car drive away as she called the police to report the incident. She saw it approach a nearby man (later identified as Jose Arriaga) and saw appellant grab the man by the neck. Campuzano saw appellant "sh[ake] [Arriaga] up and put him against the fence . . . and put his hands into his pockets and started robbing him."

On December 27, 2015, at about 3:30 a.m., Arriaga had been standing at an intersection as he saw appellant and a woman approach in a silver car. Appellant asked Arriaga if he was a gang member, told Arriaga (who does not belong to a gang) to "give [him] all [his] money" and pulled out a gun. When Arriaga said he had just one dollar, appellant searched him and grabbed Arriaga's phone.

At approximately 3:30 a.m. on December 27, 2015, after being informed by Campuzano of a robbery that had just occurred, and receiving a description of the vehicle involved, two deputy sheriffs stopped a vehicle matching that description in which a woman was driving and appellant was a passenger. Before being told he was under arrest, appellant acknowledged being on parole and said he was a member of the Florencia 13 gang. Asked about the robbery, appellant told the deputies he "was just trying to have some fun with them[,] . . .

wasn't going to hurt anybody[,]" and had been trying to impress the woman.

At the preliminary hearing a deputy sheriff testified that the incidents here occurred within the territory of the Florencia 13 gang. The gang's primary activities are "robbery, kidnapping, carjacking, attempted murder, assault with a deadly weapon, murder [and] extortion." Two other members of that gang suffered felony convictions in 2010. Appellant had been served with a criminal street gang injunction in 2009, and had admitted to law enforcement that he was a member of the Florencia 13 gang. Based on a hypothetical premised on the facts of this case, the deputy opined that the offenses were committed for the benefit of the gang.

The day after a jury trial commenced and two witnesses had testified against him, appellant pled guilty to one count of second–degree robbery and admitted the gang allegation.

At the sentencing hearing, the trial court granted appellant's second request to represent himself.[2] Appellant requested the appointment of a private investigator. The court found that appellant had failed to "set forth any good cause" for such an appointment, and denied the request. The court also denied his request to withdraw the guilty plea, which was premised on appellant's claim that he was purportedly "pressured to take that plea." (§ 1018.) Appellant was

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[2] Appellant had withdrawn a request to represent himself at trial.

sentenced to the mid–term of three years on the robbery, plus 10 years for the gang enhancement.

Appellant filed a notice of appeal on April 6, 2017. He filed a second notice of appeal on May 31, 2017, accompanied by a request for a certificate of probable cause. The certificate of probable cause was granted on June 13, 2017.

After review of the record, appellant's court–appointed counsel filed an opening brief requesting that we independently review the record pursuant to *Wende, supra,* 25 Cal.3d at page 441. In response to our advisement of his right to do so, appellant submitted a supplemental brief.

1. *Prosecution's Failure to Disclose Anticipated Testimony*

Appellant argues that the prosecution withheld material information by failing timely to inform his counsel about the nature of testimony of a law enforcement witness the prosecutor intended to call. This contention is based on the following exchange in which the prosecutor sought guidance from the court regarding the parameters of her opening statements:

> "[PROSECUTOR]: Just so that I'm clear, am I allowed to indicate that the detective will come and testimony [*sic*] as to his membership to being a gang member . . . ? I usually talk about what witnesses are going to testify and what their testimony is expected to be.
> "THE COURT: I think that at the very least it looks like [Detective] Camarillo is going to come in, so I think you can.

> "[DEFENSE COUNSEL]: We don't know what Camarillo is going to say. That's the problem. Because on the card all it says is self–admit.
> "THE COURT: No. No. She spoke with him. She said he admitted he was a Florencia 13 gang member.
> "[PROSECUTOR]: By way of text message counsel is more than welcome to take a look at where that's–what he indicated.
> "THE COURT: I think you can say that you intend to present evidence to show that he's a member of Florencia 13 without going into the details. If that doesn't happen, then I guess we try it again."

Appellant argues the prosecutor withheld information without good cause, presumably, to gain an unfair advantage. There is no showing that such was the case. First, detective Camarillo never testified at trial. Second, earlier exchanges between the court and counsel clarify that the purpose of any such testimony, if offered, would be to establish appellant's gang membership, a fact he had admitted. Appellant suffered no prejudice.

2. *Ineffective Assistance of Counsel*

Second, appellant maintains he received ineffective assistance of counsel largely because he "did not have a good relationship with [his] lawyer." In support of his claim, he points to one instance after a sidebar conference, which resulted in his counsel informing him that he "[would] not be able to help [appellant] out with one of the witnesses against [him]," referring to Arriaga), that he had no way to cross examine that witness, and that appellant should accept the plea deal of

12 (not 13) years. In sum, he asserts that, because of their poor relationship, his trial attorney forced him to accept a plea deal.

"The standard for showing ineffective assistance of counsel is well settled. 'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.] A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel. [Citations.] If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.]' [Citation.]" (*People v. Gray* (2005) 37 Cal.4th 168, 206–207 (*Gray*).)

"To succeed on his claim of ineffective assistance of counsel, [appellant] would have to show that his '(1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's

failings.' [Citation.]" (*People v. Richardson* (2007) 156 Cal.App.4th 574, 596 (*Richardson*).) Appellant has not established either prong.

The record reveals the reasons appellant's trial counsel acted as he did. At the outset of the sentencing hearing, appellant's counsel read a statement written by appellant into the record. In that letter appellant complained he had been coerced by his counsel and the court into agreeing to a plea and tricked into agreeing to 13, rather than 12 years. Responding to this claim, counsel stated he had "heavily litigated" the case through a number of pre-trial motions, and observed that appellant had initially faced a sentence of "many, many years" (30 years). Appellant rejected any offer. Later, counsel returned to discuss the issue of a plea again with his client after it had become clear during his cross-examination of Arriaga that the victim's credibility posed potential problems for appellant with the jury. Counsel also said that he continued to believe there were no valid grounds to withdraw the plea. On this record, it is clear that counsel's conduct "fell within the wide range of professional competence and that [his] actions . . . can be explained as a matter of sound trial strategy," by a diligent advocate. (*Gray, supra*, 37 Cal.4th at p. 207; *Richardson, supra,* 156 Cal.App.4th at p. 596.) Further, in light of the corresponding accounts of the robbery by an eyewitness and the victim, appellant has not shown it is reasonably probable he would have received a more favorable determination absent his attorney's purported failings. (*Richardson, supra,* 156 Cal.App.4th at p. 596.) Appellant has not satisfied his burden of establishing ineffective assistance of counsel.

3. *Judicial Misconduct*

Finally, appellant contends the court violated his sixth and fourteenth amendment rights by refusing to continue the trial to enable appellant to prepare to represent himself, effectively forcing him to proceed to trial represented by purportedly ineffective counsel. Given our conclusion that appellant did not establish ineffective assistance of counsel, this assertion is moot. Even if it were not, the argument lacks merit. Appellant was never denied an opportunity to prepare once he chose to represent himself.

On November 7, 2016, just before the jury was empanelled, appellant indicated he wanted to represent himself at trial. He did not request a continuance. After the court advised appellant of the risks associated with self–representation, and stated that the prospective jurors were about to arrive and it would "not continue the case," appellant withdrew his request to proceed in pro. per.

At the sentencing hearing on January 13, 2017, appellant renewed his motion to proceed in pro. per. The motion was granted, as was appellant's request for the amount of additional time he believed he required to enable him to prepare to represent himself. The hearing was continued to February 15, 2017.

Our independent review of the record reveals there are no arguable issues on appeal. (See *Wende, supra*, 25 Cal.3d at pp. 441–442; see also *Smith v. Robbins* (2000) 528 U.S. 259, 278–279 [upholding *Wende* procedure].)

DISPOSITION

The judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.