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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. EULISES CRUZ PEREZ, Defendant and Appellant.	G040738 (Super. Ct. No. RIF-135721) O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Gary B. Tranbarger and Bernard J. Schwartz, Judges. Affirmed.

Stephen M. Lathrop, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendant Eulises Cruz Perez of 40 counts of aggravated sexual assault (forcible rape) against his stepdaughters when they were under 14 years of age. (Pen. Code, §§ 269, subd. (a)(1), 261, subd. (a)(2); all statutory citations to this code unless noted.) Defendant argues the trial court abused its discretion by denying his motion to relieve his attorney and appoint new counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). For the reasons expressed below, we affirm.

I

FACTS AND PROCEDURAL BACKGROUND

In March 2007, N.E., born in 1991, and A.E., born in 1995, lived in Riverside County with their mother, brother, and defendant, who was their stepfather. Defendant and mother had been together about nine years and came to Riverside County from Mexico in 2001. The girls' father was deceased.

On March 26, 2007, an assistant principal at N.E.'s school caught N.E. and other girls drinking on campus. N.E. broke down crying and told him her father was having sexual intercourse with her and drinking helped her deal with the issue.

N.E. testified the first act of sexual intercourse occurred when she was 10 or 11 years old. At the beginning, the sex occurred every other day or once a week, but more recently defendant had sex with her every evening while her mother worked the nightshift at a fast food restaurant. The last sexual act occurred two or three days before N.E.'s drinking incident. Defendant warned her not to tell anyone because he would get in trouble. N.E. explained that defendant frightened her because "he was always . . . mean, and he [had] a bad temper." She also was concerned because he supported the family financially and thought if she did not say anything he would leave her sisters alone.

A.E. testified defendant had sex with her beginning when she was eight or nine years old. The sex occurred twice a week, or eight to nine times per month while

her mom worked. Defendant warned her not to reveal their encounters to anyone because he would go to jail. A.E. feared if defendant went to jail the family would have no one to help them. About a week before N.E. reported the abuse, defendant had sex with both girls together. Before this incident, neither girl knew defendant had been abusing the other.

A.S., the girls' mother, testified defendant would consume four or five beers at a time, but not every day. In phone calls from jail, defendant admitted to A.S. he had intercourse with the girls. After apologizing for his behavior, defendant urged A.S. to return to Mexico with the girls to avoid testifying against him at trial.

Defendant waived his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 and admitted having sex with the girls while his wife worked, although less frequently than they described. He attributed his behavior to intoxication and explained his wife was often too tired to have sex with him. He believed the girls wanted to have sex with him because they never told him to stop.

A physician examined the girls at the child abuse unit of a Riverside hospital. She testified A.E.'s exam was normal, but explained A.E. still may have had sexual intercourse because hymenal tissue is elastic and allows for penetration without producing an observable defect. N.E.'s hymen appeared abnormal because of the formation of scar tissue, caused by penetrating trauma. A psychologist testified concerning Child Abuse Accommodation Syndrome and explained it was not unusual for a child to accommodate ongoing sexual abuse and to delay reporting it.

An amended information charged defendant with 20 counts of violating section 269, subdivision (a)(1), against each girl.[1] Following a trial in October 2007, a

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[1] Section 269 provides, in pertinent part, "(a) Any person who commits any of the following acts upon a child who is under 14 years of age and seven or more years younger than the person is guilty of aggravated sexual assault of a child: [¶] (1) Rape, in violation of paragraph (2) or (6) of subdivision (a) of Section 261."

jury found defendant guilty of all counts and found the allegation defendant committed the offenses against more than one victim within the meaning of section 667.61, subdivision (e)(5) to be true. On December 14, 2007, the court sentenced defendant to 40 consecutive 15-years-to-life terms. (§ 269, subds. (b) & (c).)

II

DISCUSSION

Defendant's sole contention on appeal is that the trial court erred when it denied his *Marsden* motion to relieve his lawyer. We do not find the contention persuasive.

On September 6, 2007, about six weeks before the jury trial commenced, defendant requested the appointment of a new lawyer. The court conducted a confidential hearing without the prosecutor present. Defendant explained he felt counsel was "not really working on my case." Asked to explain, defendant replied, he "never gives me any good news. And I've asked him to come and see me, and he has not come to see me the whole time that he's been on my case." Defendant agreed it was not a lawyer's job to give him good news. Asked if there was anything specific he had asked his lawyer to do that he had not, defendant said, "well, I've asked him to investigate my case and everything, but no."

The court then asked whether an investigator had been assigned to his case and whether he had been interviewed. Defendant said no. Counsel explained he had an investigator working on the case, but she had not visited defendant in jail, nor had she spoken to him in court. The court asked if "that [was] going to happen soon?" Counsel explained that due to the nature of the case and defendant's admissions, their

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The prosecution alleged and proceeded on a theory defendant committed rape in violation of section 261, subdivision (a)(2), which provides, "(a) Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances: [¶] . . . [¶] (2) Where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another."

conversations had been about "resolving the case. As the Court knows, from the district attorney's perspective they are asking for something in the neighborhood of 30 years, this being a life case, two different ways. [¶] [Defendant] was not agreeable to that, so we did the preliminary hearing. And he has asked me to do something for him. The only thing I told him I could do at this point is have my investigator attempt to speak with the two minor girls, and if the mom agrees to let us talk to them, then that would be the extent of the investigation. . . . [¶] My investigator has made attempts — she has not been told 'no' at this point, but she has made attempts and we have not interviewed the girls. [¶] I do have interviews that were done by law enforcement of the girls, RCAT, as well as the interview with [defendant]. [¶] I do agree with [defendant]. I have not visited him in jail, but he and I have had many conversations in court. He's always separate from other people, and it's easy to speak with him. And he and I have spoken on many occasions about his case — the strengths, the weaknesses — and I believe he fully understands the position in his case."

Defendant admitted he had not given his attorney any witnesses to interview, but complained "in [the] five months that he's had my case, I haven't seen anything new. What he's saying about the various conversations we've had, it's not really true. He will come and talk with me just like a couple of minutes, and then he leaves." Defendant admitted he did not have any "information to tell him that will assist him in investigating [the] case." Defendant insisted "what I want is for them to really work on my case."

Counsel explained the difficulty of the case, noting defendant confessed to "having sex with each of the girls separately, six times with one, five times with the other. [¶] So the issues in this case, as I see them, is — as to [section 269] is whether or not it's force or fear or duress. But even if the jury finds there was no[ne] it's just — it's like 288. We still have the multiple victim allegation. Even on a 288a, it would be a life sentence. [¶] These are conversations I had with [defendant] every time we come to

court and specifically before prelim, because it was at that time the district attorney was willing to listen to some kind of an offer from us."

The court advised defendant it understood "why you would appreciate having your lawyer visit you in jail, [but] I'm looking at this from the viewpoint of is the lawyer doing all the things that a competent, good lawyer would do. From what I've heard that's taking place, the most important thing for an investigation is to see if it's possible for the defense investigator to talk to the two girls. That can't happen unless the mother gives permission, and so it can't just be done whenever the investigator wants to do it. . . . [¶] The other thing that a good lawyer needs to do in every case is make sure that you, the client, understand all the important parts of the case . . . [and] that means a good lawyer has to deliver news that the client doesn't want to hear because it's bad news. It's not the lawyer's fault he has to deliver bad news. It's their job to deliver accurate news."

Defendant complained "what I have told him is that all the charges that are against me aren't all real charges, and I want him to investigate that." The court stated, "[H]e is trying to do that. He said he's trying to interview the two girls, and neither he nor you nor anyone else, apparently, can think of anyone else that needs to be talked to . . . ." The court then denied defendant's request for a new lawyer: "[M]y only interest is that you receive competent legal representation, and it appears to me that is taking place."

Under *Marsden*, "'"'[w]hen a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.'"' [Citation.] The decision whether to grant a requested substitution is within the

discretion of the trial court; appellate courts will not find an abuse of that discretion unless the failure to remove appointed counsel and appoint replacement counsel would 'substantially impair' the defendant's right to effective assistance to counsel." [Citation.]'" (*People v. Abilez* (2007) 41 Cal.4th 472, 487-488.) "A *Marsden* motion is addressed to the discretion of the trial court, and a defendant bears a very heavy burden to prevail on such a motion." (*People v. Bills* (1995) 38 Cal.App.4th 953, 961.)

The trial court gave defendant an opportunity to explain the basis for his *Marsden* motion. None of his complaints suggested counsel was providing ineffective assistance of counsel or that the attorney-client relationship had devolved into an irreconcilable conflict. Counsel stated he and defendant *had* communicated in court on many occasions, and the trial court was entitled to accept counsel's explanation. (See *People v. Smith* (1993) 6 Cal.4th 684, 696.) Defendant argues their communication was not "meaningful," but defendant admitted, notwithstanding his requests that counsel "investigate" or work harder on his case, there was nothing specific he had requested of counsel that counsel had failed to do, and that he had no additional information that would assist counsel in defense. As noted in *People v. Cole* (2004) 33 Cal.4th 1158, the number of times one sees his attorney, and the way in which one relates with his attorney, does not sufficiently establish incompetence, and defendant's complaints regarding inadequate investigation or trial preparation are essentially tactical disagreements that do not by themselves constitute an irreconcilable conflict. (*Id.* at p. 1192; see *United States ex rel. Kleba v. McGinnis* (7th Cir. 1986) 796 F.2d 947, 954 ["We know of no case establishing a minimum number of meetings between counsel and client prior to trial necessary to prepare an attorney to provide effective assistance of counsel"].)

Nor has defendant pointed to anything else in the record suggesting counsel was providing ineffective representation. Counsel had reviewed the witness statements, was attempting with defendant's investigator to interview the girls, and had evaluated the evidence to determine whether the prosecution could prove forcible rape. Counsel

recognized the difficulties given defendant's admissions, the multiple-victim allegation, and defendant's rejection of a plea offer from the prosecution. As the court recognized, it was not the lawyer's job to give defendant "good" rather than "accurate" news, and it appeared defendant's lawyer was providing competent representation. The trial court did not abuse its discretion in denying defendant's *Marsden* motion.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.