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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION FIVE

**THE PEOPLE,**

**Plaintiff and Respondent,**

**A129717**

**v.**

**(Alameda County  
Super. Ct. No. CH43763)**

**A.P.,**

**Defendant and Appellant.**

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Appellant A.P. appeals from a judgment entered after a jury convicted him on one count of forcible sodomy (Pen. Code, § 286, subd. (c)(2)),<sup>1</sup> four counts of forcible rape (§ 261, subd. (a)(2)), one count of assault with a deadly weapon (§ 245, subd. (a)(1)), one count of criminal threats (§ 422), one count of kidnapping to commit rape (§ 209, subd. (b)(1)), and one count of first degree robbery (§§ 211, 212.5, subd. (a)). He contends his conviction must be reversed because (1) the trial court erred when it conducted certain pretrial hearings, and (2) the court erred when sentencing him. We conclude the court committed a sentencing error and will remand for further proceedings. In all other respects, we will affirm.

<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

## FACTUAL AND PROCEDURAL BACKGROUND

Appellant was convicted of brutally assaulting and raping his girlfriend, Maria Doe.

Appellant met Maria in September 2003. The relationship was good initially and Maria believed appellant was “very caring.” But that did not last. Appellant became possessive and he started to question everything Maria did.

An incident in May 2004 was the tipping point. Appellant and Maria went to a hotel where they engaged in consensual intercourse. Appellant left for a few minutes and returned with a woman named Linda. At that point appellant’s demeanor changed. He became angry and accused Maria of flirting with another man. Appellant spat in Maria’s face, poured a bottle of water over her, and put his hand over her mouth and nose until she began to black out. Appellant then engaged in intercourse with Maria. The next morning, appellant took Maria home.

Maria was in a state of shock. She was terrified because appellant knew where she lived and worked. She did not want to tell her family what happened because she was afraid appellant might hit her mother or sisters.

Later that same month another incident occurred. Appellant again asked Maria to get a hotel room. She did so and this time she took her five-year-old twins with her. Appellant arrived at the hotel followed by Linda a few minutes later. He was angry and punched Linda in the face. Appellant then turned his attention to Maria. He held her by the arms and began to hit her in the face too. Maria’s son tried to intervene telling appellant, “Don’t hit my mommy.” Appellant told the child to, “Shut up and sit down.” Appellant had Linda take the children out of the room. He accused Maria of infidelity, pushed her to the bed, removed her pants, and sodomized her. Appellant then removed his penis, announced to Maria that she was “going to get an infection” and engaged in vaginal intercourse with her. During the incident appellant remarked that Maria was his “property.”

In early June 2004, another incident occurred. Appellant came to Maria’s house and again accused her of infidelity. Three times appellant told Maria to stand and then

struck her so she fell. After the last blow, appellant changed his method of attack. When Maria would stand, he would kick her in her legs and “vaginal region.” This occurred about a dozen times. Appellant changed tactics yet again and began biting and punching Maria on her face.

Maria made her way to the kitchen. Appellant seized a knife, put it against Maria’s thumb and threatened to “cut [her] fucking thumb off to the tendon.”

Maria stumbled toward the living room. Appellant yanked her pants off, put her on the couch and started having sex with her. Maria saw her son was watching. She ordered him to leave.

Appellant told Maria to get a taxi so they could go to her apartment. Maria said she did not want to go, but appellant insisted telling her, “you’re not going to fuck up my life.”

Appellant and Maria went to her apartment. Appellant left for a few minutes and then returned with Linda. Maria slept briefly and when she awoke, appellant ordered her to go to the bedroom, drop her pants, and turn around. Maria did as she was told and appellant engaged in intercourse with her. Appellant again told Maria she was his “property” and that she was “going to do what [she was] told.”

The next morning, appellant again accused Maria of cheating. He punched Maria in the forehead, chest, and arms, each time striking harder and harder blows. Appellant had Maria lie on the floor and pulled off her pants. Maria protested but appellant told her, “Do what you are told.” Appellant then had intercourse with Maria.

Appellant and Linda discussed how much money they could get using Maria’s bank card. Appellant ordered Maria to give him her PIN. Maria complied. Appellant then gave Maria’s card to Linda who withdrew \$300 from Maria’s account.

Maria’s ordeal finally came to an end when she called her family and told them what was happening. An uncle called the police.

Based on these facts, an information was filed charging appellant with the offenses we have set forth above. As is relevant here, the information also alleged appellant had

used a knife when committing criminal threats within the meaning of former section 12022, subdivision (b)(1).

After extensive pretrial hearings, the case proceeded to a jury trial where the prosecution presented the evidence we have set forth above. The prosecutor also presented evidence from two women whose testimony suggested appellant's abuse of Maria was part of a familiar pattern.

Linda Doe testified that she met appellant in 2000 and, in the beginning, he was nice. But as with Maria, that quickly changed. Appellant started becoming abusive and he accused Linda of cheating. The verbal abuse then turned physical. On one occasion, appellant hit Linda in the face with his boots and caused such extensive bruising that Linda could not recognize herself. On another occasion, appellant injected water under Linda's skin causing a "bubble." Appellant thought it was funny. On yet another occasion, appellant sodomized Linda while another man was present. Appellant then "shoved his fist" up Linda's vagina and anus several times using what the other man described as a "piston type method." Appellant was a weightlifter who weighed almost 300 pounds. He used so much force that Linda started to bleed.

Another woman, A.Doe, testified appellant acted similarly with her. A. met appellant when she was 18 and, in the beginning, appellant was nice. But appellant changed. He accused A. of cheating and he began to abuse her physically. Appellant would "smack [A.] around" and "kicked [her] in [her] stomach." The beatings caused black eyes and bruises on her body. At one point, A.'s face was so swollen, it "looked like a pumpkin." Appellant also assaulted A. sexually forcing her to engage in vaginal and anal intercourse. When A. would object, appellant would tell her to "shut up" and that if she resisted, he would "break [her] jaw."

The jurors considering this evidence convicted appellant on all counts and found the knife use allegation to be true. Subsequently, the court sentenced appellant to a determinate sentence of 36 years plus a consecutive term of 7 years to life for a total term of 43 years to life.

## DISCUSSION

[REDACTED]<sup>2</sup>

### B. Sentencing Issues

#### 1. Sentence on Kidnapping to Commit Rape

Appellant was convicted on count 7 of violating section 209, subdivision (b)(1), kidnapping for rape. A violation of that statute is punishable by a sentence of “life with the possibility of parole.” (§ 209, subd. (b)(1).) But the trial court did not impose a sentence of life with the possibility of parole. Instead, it sentenced appellant to a term of seven years to life in prison.

Appellant now contends the trial court erred because the sentence it imposed was unauthorized. We agree. An appellate court may correct a sentence that is not authorized by law (*In re Hoddinott* (1996) 12 Cal.4th 992, 995-996, fn. 2), and the sentence the court imposed is simply not the sentence that is required by the statute appellant violated. We will order the appropriate modification.

The People argue the sentence imposed was correct citing *People v. Jefferson* (1999) 21 Cal.4th 86 (*Jefferson*). In *Jefferson*, the defendant was convicted of attempted premeditated murder (§§ 664, subd. (a), 187, 189), an offense that carries a sentence of imprisonment in the state prison for life. (*Jefferson*, at pp. 90, 93.) The defendant also admitted one prior strike within the meaning of the three strikes law (*id.* at p. 91), and the question on appeal was how to double a sentence that has no fixed term. Our Supreme Court resolved that conundrum by ruling that for purposes of doubling an indeterminate

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<sup>2</sup> Appellant has raised issues on appeal that potentially could implicate his health and safety. To protect appellant, this opinion will be released in two versions: a sealed version that will be released only to the parties, and a public version that contains redactions.

There exists an overriding interest that overcomes the right of the public to access the sealed portion of the opinion. That interest supports the partial sealing of the opinion. A substantial probability exists that the overriding interest will be prejudiced if the opinion is not partially sealed. The sealing is narrowly tailored and no less restrictive means exist to achieve that overriding interest. (See Cal. Rules of Court, rule 8.46(e)(6).)

sentence under the Three Strikes law, the seven-year minimum term for purposes of parole applied. (§ 3046, subd. (a)(1).) (*Id.* at p. 96.) In selecting that minimum term, the court relied on express language in the three strikes law which states, “the determinate term *or minimum term for an indeterminate term* shall be twice the term otherwise provided as punishment for the current felony conviction.” (*Jefferson*, at p. 93, citing § 667, subd. (e)(1).)

Here, we are not called upon to determine what sentence is appropriate when a statute requires that an undescribed minimum term be doubled. Rather, appellant was convicted of committing a crime that has a fixed and definite sentence: life with the possibility of parole. We conclude the court erred when it imposed a different sentence.

## 2. Whether the Sentence Violates Section 654

Appellant contends a portion of the sentence the court imposed violates section 654. To put this argument in context, further background is necessary.

The evidence in this case shows appellant kidnapped Maria when he forced her to leave her house around 6:00 a.m. on June 4, 2004. Traveling by taxi, they stopped off at a bank and then went to an apartment Maria had rented. Appellant left for a few minutes and returned with Linda. He ordered Maria to lie down with her daughter and while she did so, appellant and Linda discussed how badly appellant had beaten Maria. Maria fell asleep eventually. When Maria awoke later that day, appellant told her to go into the bedroom. There, appellant ordered Maria to drop her pants and raped her from behind.

Appellant spent the remainder of the day with Maria and Linda and all of them went to sleep that night. The next morning on June 5, 2004, appellant ordered Linda to take Maria’s children to the park. Maria was afraid because she knew what appellant was planning. After Linda left with the children, appellant began to abuse Maria verbally and physically. He punched Maria many times and then “yanked off [her] pants and started having sex with [her] . . . .”

Based on this evidence, the jurors convicted appellant on count 7 of kidnapping for rape, on count 8 for forcible rape committed on June 4, 2004, and on count 9 for

forcible rape committed on June 5, 2004. Subsequently, the court sentenced appellant to life in prison on count 7 and to consecutive six-year terms on counts 8 and 9.

Appellant now contends the trial court violated section 654 when it imposed consecutive sentences on counts 8 and 9 because both offenses arose out of the kidnapping offense. This is so, appellant argues, because the “evidence showed that he forced Maria to go to the Hayward apartment and that, while she was held against her will, he raped her twice.”

Section 654 prohibits punishment for two offenses that arise from the same act. (*Neal v. State of California* (1960) 55 Cal.2d 11, 18, disapproved on other grounds in *People v. Correa* (June 21, 2012, S163273) \_\_\_ Cal.4th \_\_\_.) “Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.” (*Id.* at p. 19.) On the other hand, if the defendant entertained multiple criminal objectives that were independent and not incidental to each other, he or she “may be punished for each statutory violation committed in pursuit of each objective” even though the violations were otherwise part of an indivisible course of conduct. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) Whether section 654 applies in a given case is a question of fact for the trial court, whose ruling will be affirmed on appeal so long as it is supported by substantial evidence. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.)

We conclude the trial court did not err when it imposed separate sentences for the two rapes appellant has identified. A course of conduct that is directed toward a single objective may give rise to multiple punishment if it is divisible by time (*People v. Beamon* (1973) 8 Cal.3d 625, 639, fn. 11; *People v. Andra* (2007) 156 Cal.App.4th 638, 640; *People v. Gaio* (2000) 81 Cal.App.4th 919, 935; *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1253), and the offenses appellant committed were divisible by time

The evidence shows appellant kidnapped Maria intending to rape her during the

early morning hours on June 4, 2004.<sup>3</sup> But appellant did not rape Maria immediately or even soon thereafter. Rather, he stopped off at a bank, had discussions with Linda, ordered Maria to sleep with her daughter, and allowed Maria to sleep. Only later, after all those events had occurred, did appellant rape Maria. The second rape was even more remote in time. It occurred the next day after appellant and Maria had a full night's sleep. The trial court noted this time sequence and imposed separate sentences for each of appellant's offenses because "each was broken up by a substantial passage of time, there is just no question that they were all separate." The trial court's ruling on this point is reasonable and is supported by substantial evidence. We conclude the court did not err when it imposed separate sentences on counts 8 and 9.

Appellant's reliance on *People v. Latimer* (1993) 5 Cal.4th 1203 (*Latimer*) does not convince us a different conclusion is warranted. In *Latimer*, the defendant and the victim were running errands together. At one point, the defendant drove to a remote area where he assaulted and raped the victim. Afterwards, he drove to a second location and raped her again. (*Id.* at p. 1206.) The trial court imposed separate punishments for the kidnapping and the two rapes. However, the appellate court held that section 654 barred separate punishments for the kidnapping and rapes because the kidnapping was carried out solely for the purpose of committing the two rapes. (*Id.* at pp. 1206-1207.) Our Supreme Court agreed finding no evidence that the defendant had "any intent or objective behind the kidnapping other than to facilitate the rapes." (*Id.* at p. 1216.)

The situation here is different from that presented in *Latimer* because there is no indication that in *Latimer* a significant amount of time elapsed between the kidnapping and the two rapes. Here, by contrast there was a lengthy period of time between the kidnapping and the first rape, and an even more lengthy period of time between the kidnapping and the second rape. We conclude *Latimer* is not controlling under the different facts presented here.

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<sup>3</sup> We note that the distinguishing characteristic of a section 209, subdivision (b)(1) offense is that it is a kidnapping with the *intent* to commit rape. No actual rape is required. (See CALCRIM No. 1203.)

### 3. Whether the Court Erred by Failing to Sentence on Counts 4 and 5

The final issue we must address has been raised by the People and is based on the following facts.

At one point during the sentencing hearing, the trial court said section 654 applied to appellant's conviction on count 4 for assault with a deadly weapon, and count 5 for criminal threats. As the court explained, "Under [section] 654, you can only be sentenced as to one. The 245 with a knife, the threats to cut off the thumb at the same time, additionally, with the one-year knife enhancement, appear to be describing in different ways the same conduct. If they are not the primary counts, then I could only charge one-third the midterm as to each. [¶] In light of the willingness to make each sexual assault count separate, I will be – I would intend to run those concurrently." Later after specifying the terms for the other charges, the court returned to counts 4 and 5 stating as follows: "if I had discretion to treat them separately, I believe under 654 I do not, I would treat them separately . . . the threats simply merge into the actual horror of the beatings and ongoing threats, under 422, the threat with a knife – I was going to pick a primary term, I simply picked the one that gave more time, and that's why it wasn't the 245, which is just as horrendous as he's waving a knife and threatening great bodily injury, but in the reality of everything else, because I have done consecutive sentences, and with everything else and the reality of the ongoing, repeated, savage beatings that accompanied each rape and the sodomy, the reality is this really does merge, just part of all that. [¶] So I will not give him a third of the midterm there."

The abstract of judgment interpreted these comments to mean the court did not impose any sentence on counts 4 or 5 and that a stay under section 654 was in effect.

The People now argue the trial court erred when it failed to impose sentence on counts 4 and 5. We agree. "[W]hen a trial court determines that section 654 applies to a particular count, the trial court must impose sentence on that count and then stay execution of that sentence. There is no authority for a court to refrain from imposing sentence on all counts, except where probation is granted." (*People v. Alford* (2010) 180

Cal.App.4th 1463, 1466.) We will remand the case to the trial court so that it can impose sentence on both counts.

Appellant argues no remand is necessary because “[t]he trial court made its intent clear.” It “sentenced appellant to concurrent terms for the assault and criminal threat counts.” It is not at all clear that is what happened. One way to read the record is that the court intended to impose concurrent terms for the assault and criminal threat counts. Another is that the court intended to impose sentence on the criminal threat count and then impose but stay a sentence on the assault with a deadly weapon count. In any event, appellant’s argument is unpersuasive because there is nothing in the record that indicates the court imposed *any* sentence on counts 4 and 5 as it was required to do. We will remand so the court can do so.

#### DISPOSITION

The case is remanded to the trial court with directions to impose sentence on counts 4 and 5, and to modify the sentence imposed on count 7 to life in prison with the possibility of parole.

In all other respects, the judgment is affirmed.

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Jones, P.J.

We concur:

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Needham, J.

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Bruiniers, J.

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