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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

LEONEL CARLOS-ZARAGOZA,

Defendant and Appellant.

A130404

(Sonoma County
Super. Ct. No. SCR586519

Leonel Carlos-Zaragoza appeals from convictions of kidnap to commit rape, rape in concert, and assault with a deadly weapon. He contends the trial court erred in failing to instruct on the lesser included offense of attempted rape, and in using the kidnapping both as an element of the rape-in-concert offense, and to increase his sentence under the one-strike law. We affirm.

STATEMENT OF THE CASE

A first amended information, filed on September 3, 2010, charged appellant with kidnap to commit rape (Pen. Code, § 209, subd. (b)(1)),¹ forcible rape (§ 261, subd. (a)(2)), rape in concert (§ 264.1) and assault with a deadly weapon (§ 245, subd. (a)(1)). In connection with counts II (forcible rape) and III (rape in concert), it was alleged that appellant was subject to a mandatory prison term of 25 years to life (§ 667.61, subd. (a)) or 15 years to life (§ 667.61, subd. (b)) due to having committed an

¹ All further statutory references are to the Penal Code unless otherwise indicated.

aggravated kidnapping and personally using a dangerous or deadly weapon (§ 667.61, subds. (a), (b), (d), (e)).²

Trial began with in limine motions on August 18, and the jury was sworn on August 26, 2010. On September 9, having been instructed that the forcible rape and rape in concert were alternative charges and appellant could not be convicted of both, the jury returned verdicts of guilty on all counts except forcible rape. The special allegations were found true.

On October 20, 2010, appellant was sentenced a prison term of 25 years to life for the rape in concert. The court imposed upper term sentences of seven years on the kidnap for rape, and four years on the assault, but stayed these terms pursuant to section 654.

Appellant filed a timely notice of appeal on November 18, 2010.

STATEMENT OF FACTS

On July 24, 2009, shortly after 11:30 p.m., Jane Doe was walking along Dutton Avenue on her way home from downtown Santa Rosa. A car drove past her, flashing its lights, turned and drove by again, passing her several times. She yelled to leave her alone and, as the car continued its passes by her, she began to get “a little bit” scared and repeatedly crossed the street, trying to stay on the side opposite to the car. She lost sight of the car for about 30 seconds, then saw it returning and began to look around for help. Seeing someone walking from what appeared to be a side street, she thought she could ask for help, then realized it was one of the men from the car. Doe was “cornered” between the car, the man, and a fence behind her.

² An initial information was filed on January 22, 2010, charging appellant and his brother, Rogelio Carlos-Zaragoza, with these offenses. A consolidated information was filed on May 26, adding additional charges against Rogelio Carlos-Zaragoza, followed by a second consolidated information filed on July 12, 2010. Appellant’s case was severed from his brother’s on July 27, 2010. Rogelio was convicted on August 13, 2010, and sentenced to a prison term of 75 years to life. The first information against appellant alone was filed on August 13, 2010.

The man, whom Doe identified as appellant, pulled out a knife, grabbed Doe from behind her back or neck, and held the knife at her throat. She began screaming, “Please don’t kill me.” Appellant forced Doe into the passenger seat of the car, on top of him, with her head face down in the center console and her feet sticking out the door, and the car took off before the door was even closed.³ Doe continued to plead for them not to kill or hurt her.

Appellant instructed Doe to get into the back seat and joined her there. She begged him to put the knife away and he eventually did. He removed most of her clothing and a tampon, got on top of her, and penetrated her vagina with his penis. Doe testified that he was “having issues,” she thought because he had been drinking, but “finally he did penetrate me briefly.” At this point she saw the lights of a police car and appellant quickly got dressed and got into the front seat. The driver started going “really fast” and Doe realized the police were following them. They drove on the freeway, got off and stopped in a “field area,” where appellant and the driver “bailed.” Doe dressed quickly and sat, stunned, until the police came a few minutes later.

Doe testified that appellant never asked her if she wanted to ride in the car, she never consented to being put in the car, she never sat in the car and made out with appellant, never told him she was interested in him, and never consented to having intercourse with him.

Witnesses who were in their yard at the corner of Dutton Avenue and Debbie Street at about midnight heard a woman screaming “help” and “please don’t kill me” and ran to investigate. The screams were coming from the area of a car near the corner, a mid- to late-1980’s or early 1990’s four-door Honda with tinted windows, a white hood and black body. The car sped off and one of the witnesses called the police and gave a description of the car.

³ Appellant did not speak to Doe, but she could tell what he wanted her to do. Throughout the encounter, the men spoke Spanish to each other and appellant spoke only a couple of words of English to Doe. Doe did not speak Spanish.

California Highway Patrol Officer Marcus Hawkins was parked on the shoulder of the freeway at about 12:20 a.m. when a 1990's Honda Accord with a white hood sped by. The car failed to slow down in response to Hawkins's attempt to initiate a traffic stop, and Hawkins pursued it off the freeway and on the local road at speeds reaching 80 miles per hour, until the car stopped abruptly in the middle of the road. The driver and a passenger jumped out of the car and ran in separate directions. Hawkins pursued the driver, but was not able to catch him. He returned to the Honda, where he found Doe sitting in the rear seat. She told him she had been kidnapped at knife point and raped.

Sonoma County Sheriff's Deputy Shawn Forghani arrived at the scene and spoke with Doe, who was extremely distraught. She described the man who assaulted her as Hispanic, probably in his 30's, five foot six or seven inches tall, with a "chin strip style" beard and short dark spiky hair, wearing a black shirt with white lettering. She said she did not get a good look at the driver and gave a very vague description of him. A few moments later, Forghani took Doe around the corner, where other officers had apprehended a person she identified as the man who assaulted her. The man was identified at the scene as Rogelio Zaragoza.

Appellant was apprehended at about 5:00 a.m., trying to enter a residence in the area. He had a pocket knife in his possession. At trial, Doe identified this knife as the one appellant held during the incident. Doe testified that she initially thought the person she identified at the scene was the one who assaulted her, but as soon as she saw appellant later in the morning, she knew appellant was the one who assaulted her and the first man she identified was the driver.

The detective who interviewed appellant testified that appellant initially said he and his brother were out driving around, they saw a young woman walking, appellant approached her and asked if she wanted a ride, she got into the car calmly, a police officer tried to make a stop as they were driving on the freeway, they got off the freeway, the woman started crying in the backseat, and the brothers stopped the car and ran. Appellant then told a second story, saying he and Doe both got into the back seat of the

car, he caressed her, kissed her cheek and asked if she wanted to “ ‘make love’ ”; he took his own and Doe’s pants off and penetrated her vagina “slightly” with his penis before the police turned their emergency lights on the car. Confronted with the statements of the witnesses who saw Doe forced into the front seat of the car, appellant said Doe got into the front seat, he followed her, and once the car was driving, they moved into the back seat. Appellant initially denied having a knife, then said he had a small knife but it was in his pocket, then admitted he had the knife in his hand when he contacted Doe, saying the knife was closed but she probably saw it. The detective told appellant that DNA samples were going to be collected from him and left the room; within seconds, he saw on the monitor that appellant spit and blew snot onto his hands, trying to clean them “with whatever liquid he could come up with,” and blew more snot on his hands and put them inside his pants in his groin area. DNA testing of samples taken from appellant’s penis contained female DNA matching Doe’s DNA profile.

Defense

Appellant testified that he was 38 years old, a field worker, and could understand some English but could not speak it. On July 24, 2009, he and his brother started drinking about 2:00 p.m. and continued, slowly, throughout the day and evening. Later, while driving around, they saw Doe walking, pulled up alongside her, and parked on the edge of the road. Appellant asked if she would go with them to drink beer and understood her response to be “okay.” Appellant opened the door and she got into the front seat, sitting on top of appellant for a moment, then appellant got into the back and asked if she wanted to come back, and she joined him. Appellant testified that Doe got into the car calmly and willingly and did not yell, “Please don’t kill me.” He had a knife in his pants pocket, but did not do anything with it.

Appellant and Doe were talking to each other, he in Spanish and she in English, and they were also communicating with hand signals. He asked in Spanish if she “liked to have sex,” and she responded “okay” in English. She took her clothes off and leaned back. Appellant unbuckled and pulled down his pants, leaned toward Doe, trying to kiss

her, then suddenly saw the light from the police car. He told Doe the police were there and she said, “Oh, my God.” She had not seemed upset before, but at this point became startled and nervous. Appellant got dressed and got into the front seat. His brother did not immediately pull over in response to the police; he drove off the freeway, ran a red light, and then stopped the car. When he stopped, appellant ran and tried to hide because he was on a work program and on probation due to a traffic accident, and he did not want to “get in bad with the county.”

Appellant testified that he did not force Doe into the car, force her to have sex with him, or threaten her with a knife, and that she did not say or do anything to indicate she did not want to get into the car or have sex with him. When asked if his penis made contact with her vagina, appellant testified, “I don’t know. I think not.” Asked how Doe’s DNA could have been found on a sample taken from his penis, appellant testified that he “tried to come alongside her but I don’t know if I was inside her or not,” and it was “only a second or so that I was close to her.” Appellant testified that he was with Doe, from the time he contacted her until he ran away from the car, for a total of five to ten minutes.

DISCUSSION

I.

Appellant contends his constitutional rights to due process and a fair trial were violated by the trial court’s failure to instruct the jury sua sponte on the lesser included offense of attempted rape. Claiming that he testified that Doe consented to sex and he tried to penetrate her but was not successful, appellant argues that although the jury did not believe Doe consented, it might have believed he did not succeed with penetration.

Attempted rape is a lesser included offense of rape. (*People v. Atkins* (2001) 25 Cal.4th 76, 88; *People v. Kelly* (1992) 1 Cal.4th 495, 528.) “[A] trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence. On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support.” (*People v. Breverman* (1998)

19 Cal.4th 142, 162 (*Breverman*)). Instructions on a lesser included offense are required “whenever evidence that the defendant is guilty only of the lesser offense is ‘substantial enough to merit consideration’ by the jury. (*Ibid.*, quoting *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12.) “ ‘Substantial evidence’ in this context is ‘ ‘evidence from which a jury composed of reasonable [persons] could . . . conclude[.]’ ” that the lesser offense, but not the greater, was committed. (*Flannel, supra*, at p. 684, quoting *People v. Carr* (1972) 8 Cal.3d 287, 294; accord, [*People*] v. *Barton* [(1995)] 12 Cal.4th 186, 201, fn. 8 [‘evidence that a reasonable jury could find persuasive’].)” (*Breverman*, at p. 162.) Instructions on the lesser offense of attempted rape are not required where there is no evidence that the defendant intended to commit rape but was unsuccessful in the attempt. (*People v. Holt* (1997) 15 Cal.4th 619, 674.)

Appellant urges that the evidence in the present case supported an instruction on attempted rape because he testified that he tried to penetrate Doe but was unsuccessful and none of his DNA was found in Doe. As to the former, appellant’s characterization of his own testimony is incorrect: He testified that he did not think he penetrated Doe’s vagina with his penis but was not sure—in other words, he might have—not that he tried to penetrate her but was unable to do so. The defense never suggested to the jury that appellant committed an attempted rape but not a complete one: The sole theory of defense was that appellant’s sexual encounter with Doe was consensual and the only question for the jury was appellant’s mental state, whether he reasonably believed she consented.⁴

⁴ Defense counsel argued, “What is at issue here is his state of mind. . . . [¶] . . . [¶] . . . [T]he instruction says the defendant is not guilty of rape if he actually and reasonably believed that the woman consented to the intercourse. [¶] . . . [¶] . . . [T]here was interaction between these two people; Jane Doe and Leonel Carlos Zaragoza. They don’t speak the same language. They have an interaction which obviously they had different understandings about. You heard Jane Doe testify. You heard Leonel testify. You could decide what you believe about that. [¶] If you have a reasonable doubt that he did not reasonably and actually believe she consented to the movement, she consented to the intercourse then you must find him not guilty. . . . [¶] . . . [¶] The question is what

In any event, any error in failing to instruct on attempted rape would be harmless. “An erroneous failure to instruct on a lesser included offense requires reversal of a conviction if, taking into account the entire record, it appears ‘ “reasonably probable” ’ the defendant would have obtained a more favorable outcome had the error not occurred.” (*People v. Ledesma* (2006) 39 Cal.4th 641, 716, quoting *Breverman, supra*, 19 Cal.4th at p. 178.) As just described, appellant testified that he did not think his penis penetrated Doe’s vagina but was not sure, and never testified that he attempted to penetrate Doe and was unsuccessful. Doe testified unequivocally that appellant did insert his penis into her vagina. Her testimony was corroborated by the facts that appellant told the police he penetrated Doe’s vagina “slightly” with his penis and was observed apparently trying to clean his groin area after being told DNA would be collected from him, and that Doe’s DNA was found on appellant’s penis. The jury plainly rejected appellant’s defense of consent, which was contradicted not only by Doe’s testimony, but by the testimony of the neighbors who heard her screaming and the sheer implausibility of her consenting to sexual intercourse in the back seat of a car with a stranger within some five minutes of him stopping her on the side of the road. The jury had no reason to accept the evidence that Doe was forced into the car against her will but reject the evidence that appellant raped her.

II.

Appellant also contends that in imposing an indeterminate sentence of 25 years to life, the trial court violated the rule of *In re Shull* (1944) 23 Cal.2d 745 and *People v. Edwards* (1976) 18 Cal.3d 796, prohibiting dual use of a prior conviction both as an element of an offense and to enhance the punishment for that offense. He maintains the

was his state of mind? What did he believe? What did he believe was going on there? This is a woman that he sees walking on the street at night. She ends up in his car. They end up having some sexual contact. What was in his mind? Did he believe she was consenting to this? That’s the question. Was it reasonable for him to believe that? [¶] . . . [¶] What is at issue is whether or not Leonel believed, reasonably believed, that this was a consensual encounter. . . .”

kidnap of Doe was an element of his rape in concert conviction in that the kidnapping by Rogelio was what made the rape “in concert,” and the trial court improperly also used the kidnapping as a circumstance justifying the indeterminate sentence.⁵

Appellant was sentenced pursuant to section 667.61, which provides that “any person who is convicted of an offense specified in subdivision (c) under one or more of the circumstances specified in subdivision (d) or under two or more of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for 25 years to life.” Section 264.1, rape in concert, is one of the qualifying offenses under section 667.61, subdivision (c). In finding appellant guilty of rape in concert, the jury found true the allegation that “the defendant kidnapped the victim of the present offense and the movement of the victim substantially increased the risk of harm to the victim over and above that level of risk necessarily inherent in the underlying offense in subdivision (c),” the circumstance described in section 667.61, subdivision (d)(2). The jury additionally found true allegations describing two circumstances described in section 667.61, subdivision (e): that “[t]he defendant kidnapped the victim of the present offense in violation of Section 207, 209 or 209.5” (§ 667.61, subd. (e)(1)), and that “[t]he defendant personally used a dangerous or deadly weapon in the commission of the present offense” (§ 667.61, subd. (e)(3)).⁶

In re Shull, supra, 23 Cal.2d 745, held that a defendant convicted of assault with a deadly weapon (§ 245) and of being a felon in possession of a firearm could not be

⁵ Appellant asserts that “[b]y the prosecution’s evidence, what made the offense ‘in concert’ was the kidnapping of the victim by appellant’s brother, Rogelio. Appellant under this scenario aided and abetted Rogelio.” The prosecutor’s theory at trial was that Rogelio aided and abetted appellant’s kidnap and rape of the victim. The prosecutor told the jury that the offense of rape in concert required that “the defendant voluntarily acted with someone else; in this case, his brother Rogelio; who aided and abetted its commission.” The prosecutor then described how the evidence showed Rogelio aiding and abetting appellant during the incident.

⁶ At the time the offenses were committed, this circumstance was designated subdivision (e)(4). (Stats 2010, ch. 219, § 16 (A.B. 1844).)

subjected to an additional term, consecutive to those imposed for the two convictions, under section 3 of the Deadly Weapons Act, which required an additional term for any person armed with a concealable firearm while committing a felony. (*Id.* at pp. 750-751.) *Shull* reached this conclusion by applying the rule that a special statute controls over a general one. (*Id.* at p. 750.) Section 245 is a specific provision, defining and determining the punishment for the offense of assault with a deadly weapon. (*Id.* at p. 750.) The statute under which the additional term was imposed, section 3 of the Deadly Weapons Act, “refers to no particular crime, but purports to require an added punishment for felonies generally where the one committing the same is armed with a pistol or the other weapons designated therein and in section 1.” (*Shull*, at p. 750.) The *Shull* court concluded that “the Legislature has fixed the punishment for an assault where a deadly weapon is used, a particular crime, and it is not to be supposed that for the same offense without any additional factor existing the added punishment should be imposed.” (*Id.* at p. 751.)

People v. Edwards, *supra*, 18 Cal.3d at page 800, sua sponte corrected an “obvious error in sentencing” where a defendant convicted of being a felon in possession of a firearm was given an augmented sentence under a statute increasing the otherwise applicable minimum sentence where a defendant had suffered prior convictions. *Edwards* explained that the trial court’s “reliance on defendant’s prior conviction for the dual purpose of augmenting sentence and providing an essential element of the charged offense . . . runs afoul of the established rule . . . that when a prior conviction constitutes an element of criminal conduct which otherwise would be noncriminal, the minimum sentence may not be increased because of the indispensable prior conviction.” (*Ibid.*)

Appellant asserts that his punishment could not be increased under section 667.61 because “Rogelio’s kidnapping of the victim, as aided and abetted by appellant, was what made the offense a violation of section 264.1” and also the basis for the 667.61, subdivision (d)(2) and (d)(5) factors that subjected appellant to punishment under section 667.61, subdivision (c). Respondent offers a variety of arguments against this contention,

including that appellant forfeited the issue by failing to object in the trial court and that the *Edwards/Shull* rule does not apply to sentencing under the one-strike law, was limited to circumstances involving prior convictions, and does not apply because the trial court stayed punishment for the aggravated kidnapping under section 654. We do not reach these arguments because we find another dispositive: As a factual matter, there was no violation of the *Edwards/Shull* rule.

The essential premise of appellant's argument is that the kidnapping of the victim was an element of the offense of rape in concert. "In order to be found guilty of the crime of rape in concert, a defendant must 'voluntarily acting in concert with another person,' commit the crime of rape 'by force or violence and against the will of the victim.' (§ 264.1.) He may do so 'either personally or by aiding and abetting the other person.' (*Ibid.*)" (*People v. Keovilayphone* (2005) 132 Cal.App.4th 491, 496.) If liability is based on aiding and abetting, the defendant must have "had the *specific intent* to aid the perpetrator, i.e., had knowledge of his criminal purpose as well as an intent to encourage, facilitate or instigate commission of the offense." (*Id.* at p. 497.)

The jury was instructed that in order to prove appellant guilty of rape in concert, the prosecution had to prove that appellant "personally committed forcible rape, and voluntarily acted with someone else who aided and abetted its commission." Consistent with this instruction, the prosecutor told the jury that the first element of rape in concert was that appellant personally committed forcible rape and the second element was that appellant "voluntarily acted with someone else; in this case, his brother Rogelio; who aided and abetted its commission." Elaborating on how Rogelio aided and abetted appellant, the prosecutor argued that the evidence showed Rogelio knew appellant intended to rape Doe, intended to aid and abet appellant and, in fact, did aid and abet appellant's commission of the rape. "[B]efore the commission of the crime," the prosecutor told the jury, Rogelio drove the car, cornered Doe with it, opened the door to allow appellant to force her inside, and heard her screaming "please don't kill me." "[D]uring the commission of the crime," Rogelio saw appellant direct Doe into the back

seat, heard her plead with appellant to put the knife away, knew appellant was undressing and raping Doe in the back seat, and refused to stop the car for the police.

Appellant asserts that all the things respondent offers to show Rogelio aided and abetted the rape would have been done as part of the kidnapping and therefore cannot be isolated from the kidnapping. But this ignores the fact that once the victim was inside the car, the kidnapping was complete; by continuing to drive and attempting to evade the police while appellant raped Doe in the backseat, Rogelio specifically aided and abetted the rape. The essential point in *Edwards* and *Shull* was that a single fact may not be used both to establish an element of an offense and as a basis for more severe punishment than would normally be imposed for that offense. (See *People v. Tillman* (1999) 73 Cal.App.4th 771, 780.) Here, substantial evidence supported a conclusion that *in addition* to the acts Rogelio committed that constituted, or served to aid and abet, the kidnapping, Rogelio aided and abetted appellant's commission of the rape by continuing to drive the car while appellant forcibly raped Doe, thereby providing appellant with the place and opportunity to commit the rape.

Moreover, the kidnapping was not an element of the offense of rape in concert, but rather a theory under which appellant was prosecuted. Appellant argues that kidnapping was an element of the rape in concert because it was the "means used to inflict the 'force or violence' allegedly employed against the victim." One of the elements of forcible rape is that the defendant "accomplished the intercourse by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the woman or to someone else." (CALCRIM No. 1000.) But "[t]he particular means by which fear is imparted is not an element of rape." (*People v. Iniguez* (1994) 7 Cal.4th 847, 857, citing *In re Michael L.* (1985) 39 Cal.3d 81, 88 ["The particular means by which force is employed or fear imparted is not an element of robbery"].) Even without reference to the kidnapping, substantial evidence supported a conclusion that appellant continued to hold the knife after Doe was in the car and did not put it away until she was already in the backseat, where he proceeded to rape her.

The judgment is affirmed.

Kline, P.J.

We concur:

Haerle, J.

Lambden, J.