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

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL ALFREDO FLORES,

Defendant and Appellant.

A132803

**(Contra Costa County
Super. Ct. No. 05-071241-4)**

A jury convicted appellant Daniel Alfredo Flores of multiple felony offenses in connection with the kidnapping and sexual assault of 17-year-old Jane Doe (Jane). Appellant challenges the judgment of conviction, alleging instructional and sentencing error. We find no error and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On August 17, 2007, appellant was charged by information with 11 felony counts that occurred on October 14, 2005, including kidnapping for ransom (Pen. Code, § 209, subd. (a)) (count one); kidnapping for sexual purposes (*id.*, § 209, subd. (b)) (count two); first degree residential burglary (*id.*, §§ 459, 460, subd. (a)) (count three); forcible rape (*id.*, § 261, subd. (a)(2)) (counts four through nine); sodomy by use of force (*id.*, § 286, subd. (c)(2)) (count ten); and false imprisonment (*id.*, § 236) (count eleven). Appellant also was charged with committing a first degree residential burglary (*id.*, §§ 459, 460, subd. (a)) on December 15, 2005 (count twelve). The information also alleged special

circumstances supporting life incarceration on counts one through ten (*id.*, § 667.61, subds. (a), (e).)

In March 2011, the case proceeded to a jury trial, with nine days of evidence and argument. The jury deliberated for more than two days before reaching a verdict. The jury acquitted appellant on count one, convicted him on counts two through twelve, and found the special allegations true except a “tying and binding” allegation as to count nine.¹

Appellant filed a timely notice of appeal from the judgment.

The Prosecution’s Case

Jane testified as follows: In October 2005, she was 17 years old and lived in an apartment with her parents and siblings. She shared a bedroom with her sister, but her sister slept on the living room sofa the night of October 13, 2005. Her bedroom window did not lock properly.

Around 3:00 a.m., Jane was awakened by a tap on her shoulder. She saw the dark shadow of a man who said he was from the fire department and told her, “[W]e need to go.” Believing the building was on fire, she left with the man, who covered her eyes, nose, and upper lip with his gloved hand and guided her out the front door of the apartment. He took Jane to a dark-colored car across the street and put her in the trunk. Jane said, “Please don’t. Please stop.” She did not resist because the man was much bigger than she.² The man drove away with Jane in the trunk.

After 15 minutes or so, Jane felt the car pull into a driveway and heard a garage door open. The man opened the trunk, covered her face and told her to be quiet. She complied because she was scared. The man put her on her hands and knees and told her to look down. She could see the man’s feet and noted his skin was “dark tan.” The man duct-taped her eyes closed, wrapped duct tape around her head two or three times, and duct-taped her hands together behind her back. He told Jane he would not hurt her if she

¹ The court sentenced appellant to a total term of 80 years to life.

² Jane was five feet two inches tall and weighed 98 pounds. The man was a few inches taller with a “very big build, sort of muscular,” and weighed 190 or 200 pounds.

did not scream. The man stood her up, took her to another room, and laid her face-down on a bed.

The man then sexually assaulted Jane numerous times that night and the next morning. Shortly before leaving the scene of these assaults, the man tried to scrub the duct tape residue from Jane's wrists but was not successful. The man retied her wrists and ankles with rope. He then guided her back to the garage and put her in the trunk, with a towel covering her body. She heard the garage door open, and the car backed out. About 20 minutes later, she felt the car driving on dirt and gravel. The man opened the trunk, removed the towel from her body, picked her up, set her naked body on the ground, and then drove away.

Jane freed her hands and feet and removed the duct tape from her eyes. It was daytime and she was in a vacant lot. She covered herself with plastic bags and newspapers and started walking to find help. She was in pain, bleeding, and in shock. Two blocks away, she encountered two women who gave her a robe and called police.

Robert Forcadilla testified that around 9:00 a.m. on October 14, 2005, he looked out his window and saw a car backing far down a dirt alleyway across the street. A man popped the trunk, got out of the car, grabbed what looked like a body from the trunk, and tossed it behind him. The man then got in the car and left. The man was a "little heavy-set," between 5 feet 8 and 10 inches tall, "fair-skinned, maybe [W]hite, maybe Latino," "maybe mid-twenties, maybe thirties." The car was "a sedan, four-door, looked like a BMW, like a dark color, maybe green or black," "a big one . . . like, 500 series"; Forcadilla estimated it was a model from "the mid-nineties, maybe early 2000." As the car drove away, Forcadilla saw the license plate started with either 5G or 5B. Later, he saw a girl come out of the bushes, wearing nothing but plastic.

Elizabeth LaGorce testified she was the sexual assault nurse who examined Jane at the hospital on October 14, 2005; she provided the results of that examination. LaGorce's observations during the exam were consistent with sexual assault.

That evening, Jane's father found the screen from Jane's bedroom window on the ground, "bent out." The window was open, and the top of the frame was bent. Law

enforcement found fresh pry marks around the window and dirt on the bedding under the window inside.

On December 18, 2005, at 1:00 a.m., Jane's father noticed that the door to her former bedroom was closed,³ and he heard rustling inside. He abruptly opened the door and saw a heavy-set Hispanic man between 5 foot 8 and 10 inches tall backing out the window. Jane's father chased the man out the window and ran after him but was unable to catch him. The man got into a dark, four-door sedan. Jane's father identified appellant in a six-pack photo line-up and at trial as the man he chased out of his home.

Criminalist David Stockwell testified as an expert in DNA analysis and population genetics. Stockwell said he developed genetic profiles for the materials extracted from Jane's oral and vaginal swabs and entered the profiles into the "CODIS DNA database" in January 2006.

The lead detective on Jane's case, Tiffany Van Hook, learned that a BMW was registered to appellant, license plate No. 5GBR092.⁴ Appellant had a warrant listing an address that was less than one-half mile from Jane's home.⁵ Another outstanding warrant listed an address at 1309 Prominent Drive, which was "16.9 miles" from Jane's home and 13 miles from the lot where she was left.

Shortly thereafter, appellant was arrested at his home at 1309 Prominent Drive. He gave law enforcement the wrong name, date of birth, and age. He continued to deny he was Daniel Flores, even when shown his DMV photo. He falsely stated he did not live at 1309 Prominent Drive and that keys found on his person were not his. Officers executed a search warrant at the address and found twine, duct tape, latex gloves, and work gloves in the garage. Appellant was taken to the sheriff's investigations unit, where he provided cheek swabs as DNA reference samples.

³ After the incident, Jane's brother changed bedrooms with her.

⁴ Appellant's next-door neighbor testified that appellant drove a dark green BMW in late 2005. A credit union representative confirmed that appellant purchased a 1998 BMW 5-series in June 2005.

⁵ Appellant's parents lived at this address.

Stockwell reran the DNA samples taken from Jane and found they matched appellant's reference sample to a high degree of certainty.

Appellant's Testimony

Appellant denied kidnapping and raping Jane in October 2005 and entering her home in December 2005. He admitted having sexual intercourse with her, but maintained it was consensual. He left Jane in an alley, naked and with her hands and feet tied with twine and duct tape over her eyes. He did so because he had just learned Jane was a minor and he was high and had drugs on his person.

Rebuttal

In rebuttal, the prosecution played a recording of appellant's interview with law enforcement, in which he denied knowing Jane and said he did not know how his DNA got inside her. Van Hook said appellant denied driving a BMW and having consensual sex with anyone on October 14, 2005.

Jane testified she did not know appellant, had never seen him before, did not invite him into her room, and did not consent to sexual activity with him.

DISCUSSION

I. Instructional Error

We review a claim of instructional error de novo (*People v. Posey* (2004) 32 Cal.4th 193, 218), addressing each of the challenged instructions in turn.

A. CALCRIM No. 361

Appellant contends the court erred in instructing the jury under CALCRIM No. 361: "If a defendant failed in [his] testimony to explain or deny evidence against [him], and if [he] could reasonably be expected to have done so based on what [he] knew, you may consider the failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove each element of the crime beyond a reasonable doubt. [¶] If a defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure." Appellant argues this instruction is unconstitutional and without evidentiary support.

1. Constitutionality

Appellant contends CALCRIM No. 361 improperly singles out a defendant's testimony, in a manner that becomes a comment on the evidence by inviting the jury to subject his testimony to special scrutiny. He argues this instruction "can have a chilling affect [*sic*] on the constitutional right of the defendant to testify, knowing that his . . . testimony will be subject to special scrutiny injected into the case by this instruction." He also maintains CALCRIM No. 361 "is inconsistent with the dictate of CALCRIM No. 226 that the jury 'must judge the testimony of each witness by the same standards.' "

In *People v. Saddler* (1979) 24 Cal.3d 671 (*Saddler*), the California Supreme Court rejected a similar constitutional challenge to a substantially similar instruction, CALJIC No. 2.62.⁶ (*Saddler*, at pp. 680-681; *People v. Rodriguez* (2009) 170 Cal.App.4th 1062, 1066 (*Rodriguez*)). *Saddler* reasoned that the instruction "was consistent with Evidence Code section 413[,] which permits the drawing of inferences from any party's failure to explain or deny evidence against him. Since the only testifying 'party' in a criminal case is the defendant, the code section can have reference only to him."⁷ (*Saddler*, at pp. 680-681, fn. omitted.) In *Rodriguez*, the Court of Appeal

⁶ The version of CALJIC No. 2.62 at issue in *Saddler* stated: " 'If you find that [the defendant] failed to explain or deny any evidence or facts against him which he can reasonably be expected to deny or explain because of facts within his knowledge, you may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable. In this connection, however, it should be noted that if a defendant does not have the knowledge that he would need to deny or to explain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain such evidence. The failure of a defendant to deny or explain evidence against him does not create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt.' " (*Saddler, supra*, 24 Cal.3d at p. 677, fn. 4.)

⁷ Evidence Code section 413 states: "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case."

concluded the reasoning of the court in *Saddler* “applies with equal force to CALCRIM No. 361.” (*Rodriguez*, at p. 1067.)

Appellant contends we should reexamine the holdings in *Saddler* and *Rodriguez*, but provides no persuasive reason to do so. He argues Evidence Code section 413 “is properly applied in a civil case, where the opposing parties are on equal footing in regard to this principle, but it should have no application in a criminal case in which the concept applies only to the defendant, tilting the playing field in a manner which is not consistent with the right to a fair trial and due process of law under the Fifth and Fourteenth Amendments.” We reject this assertion, noting that CALCRIM No. 361 leaves it to the jury “to decide the meaning and importance” of a defendant’s failure to explain evidence against him and informs the jury that such a failure “is not enough by itself to prove guilt” and does not relieve the People of their burden to prove him guilty beyond a reasonable doubt.⁸ In *Saddler*, the court emphasized these factors in concluding that a similar instruction did not infringe on a defendant’s due process rights by denying him the presumption of innocence, raising an inference of guilt, or lightening the prosecution’s burden. (*People v. Redmond* (1981) 29 Cal.3d 904, 911; *Rodriguez*, *supra*, 170 Cal.App.4th at p. 1066; see also *Saddler*, *supra*, 24 Cal.3d at pp. 679-680.)⁹

⁸ Appellant argues CALCRIM No. 226, the standard instruction on witness credibility, could be amended to make the principles set forth in CALCRIM No. 361 applicable to all witnesses. As respondent correctly notes, however, “nonparty witnesses have no control over the content of their testimony, and therefore might not be given the opportunity to explain or deny a particular fact or piece of evidence.”

⁹ Appellant cites *People v. Haynes* (1983) 148 Cal.App.3d 1117 (*Haynes*), stating, “the Court of Appeal found such substantial problems with CALJIC No. 2.62 that the court suggested that the instruction should not be given unless both parties expressly agreed and the case presented a significant omission by the defendant in explanations or denials.” In *Haynes*, the court simply “agree[d] that in light of the hostile reception this instruction has received of late from legal logicians and semanticists [citations], it will always be unwise of a trial court to include it among its general instructions *without prior inquiry of the parties concerning it*.” (*Id.* at pp. 1119-1120, italics added.) The court stated the parties should request this instruction only if “there is some specific and significant defense omission that the prosecution wishes to stress or the defense wishes to mitigate” because “[i]n the typical case it will add nothing of substance to the store of

2. Evidentiary Support for CALCRIM No. 361

Appellant also contends this instruction is not supported by the evidence. “The trial court has the duty to instruct on general principles of law relevant to the issues raised by the evidence [citations] and has the correlative duty ‘to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues.’ [Citation.] ‘. . . [B]efore a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference [citation].’ [Citation.]” (*Saddler, supra*, 24 Cal.3d at p. 681.) Thus, CALCRIM No. 361 was proper here if the evidence supports an inference appellant “failed in [his] testimony to explain or deny evidence against [him],” and “[he] could reasonably be expected to have done so based on what [he] knew.”

We conclude the record provides sufficient evidentiary support for this instruction. Among other things, appellant testified that he bound Jane’s wrists with twine when he left her in a vacant lot, but he failed to explain why she had duct tape residue on her wrists when he claimed only to have bound her wrists with twine. In addition, he failed to explain why he duct-taped Jane’s eyes shut when, as the trial court noted, “under his story, she would know exactly who he was.” Both of these matters were “within his own knowledge and as to events in which he was an active participant and fully able to speak when he voluntarily took the stand in his own behalf.” (*Caminetti v. United States* (1917) 242 U.S. 470, 495.) “‘[I]t is a legitimate inference that, could he have truthfully denied or explained [this] incriminating evidence against him, he would have done so.’” (*Id.* at p. 493.) The jury was entitled to take these omissions into consideration, and the trial court did not err in instructing the jury under CALCRIM No. 361.

knowledge possessed by a juror of average intelligence”; “if its terms are adhered to . . . , its message will be essentially irrelevant in the absence of some designated glaring hiatus in the defendant’s testimony.” (*Id.* at p. 1120.) The court noted, “the prosecution’s practice of routinely tendering this ‘form’ instruction merely permits the defense . . . to generate an automatic claim of error on appeal.” (*Ibid.*)

B. *CALCRIM No. 226*

Appellant contends the court erred in instructing the jury under CALCRIM No. 226: “If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest.” Appellant contends this instruction invited the jury to reject all his testimony and deprived him of a fair trial because the jury “should not be encouraged to reject the testimony on all subjects just because it decides it believes [he] has been untruthful on one subject.”

We reject these contentions. The challenged language is neutral and simply allows jurors to consider the fact that a witness lied in determining how much of his or her testimony to believe. It is not reasonably likely that the jury construed this language otherwise. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 214-215.) The Supreme Court upheld a similar instruction in *People v. Lang* (1989) 49 Cal.3d 991, 1023 (approving “a long line of intermediate appellate decisions [citations] holding that [a similar instruction,] CALJIC No. 2.21, is a correct statement of the law and appropriately given where there is an evidentiary basis to support it”).¹⁰

Appellant argues the jury is more likely to apply this instruction to a criminal defendant because he always has a motive to lie, and the instruction should not be given when the defendant is its likely target. The California Supreme Court rejected this argument in *People v. Beardslee* (1991) 53 Cal.3d 68 (*Beardslee*). In that case, the

¹⁰ CALJIC No. 2.21 (4th ed. 1979, bound volume) (CALJIC No. 2.21) read: “A witness willfully false in one material part of his testimony is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you shall believe the probability of truth favors his testimony in other particulars. [¶] However, discrepancies in a witness’ testimony or between his testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience; and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance.”

defendant argued that, because CALJIC No. 2.21 could be applied to his testimony, it improperly shifted the burden of proof, “increas[ing] his burden from that of raising a reasonable doubt of the sufficiency of the prosecution’s evidence to one of affirmatively proving his defenses.” (*Beardslee*, at p. 94.) The high court disagreed, stating, “The instruction at no point *requires* the jury to reject any testimony; it simply states the circumstances under which it *may* do so. [Citation.]” (*Id.* at p. 95.) The court concluded, “ . . . CALJIC No. 2.21 does nothing more than explain to a jury one of the tests [it] may use in resolving a credibility dispute.” [Citation.] ‘The weaknesses in [the defendant’s] testimony should not be ignored or given preferential treatment not granted to the testimony of any other witness. As it has been aptly noted in other contexts, a defendant who elects to testify in his own behalf is not entitled to a false aura of veracity. [Citations.]’ [Citation.]” (*Ibid.*)

Appellant maintains, however, that the challenged language in CALCRIM No. 226 “encourages, more strongly than does CALJIC No. 2.21.2, a jury to reject the entire testimony of the defendant if it finds a material falsehood somewhere in his testimony.”¹¹ He argues, “rather than using the relatively more neutral ‘may’ [the first sentence of CALCRIM No. 226] tells jurors they ‘should’ disbelieve everything a witness” has said. In addition, he asserts that the second sentence of the instruction “short-circuits the ongoing contrasting and comparing of various sources of evidence in which a jury should engage before reaching ultimate conclusions about the facts but urg[es] an early discard of some portions of the evidence in the case.” These specific arguments were rejected in *People v. Warner* (2008) 166 Cal.App.4th 653, 656-658 (*Warner*). In that case, the court concluded “both [CALCRIM No. 226 and CALJIC No. 2.21.2] are facially neutral instructions that apply to all witnesses who testify at trial and that focus no more on the defendant’s testimony than on that of any other witness.” (*Id.* at p. 658.) The court

¹¹ In the late 1980’s, CALJIC No. 2.21 was divided into CALJIC Nos. 2.21.1 and 2.21.2. The first paragraph is now found in CALJIC No. 2.21.2. Language similar to the second paragraph now appears in CALJIC No. 2.21.1. (See *People v. Lang*, *supra*, 49 Cal.3d at p. 1023, fn. 15.)

noted, “CALCRIM No. 226 states that the jury ‘should *consider* not believing’—*not* that the jury *should not believe*—anything in the testimony of a witness who lied about something significant.” (*Ibid.*) The court found the language in CALCRIM No. 226 analogous to the permissive language in CALJIC No. 2.21.2 and was unpersuaded that semantic differences between the two were even material, let alone prejudicial. (*Warner*, at pp. 658-659.)

C. CALCRIM No. 1190

Appellant also contends the trial court erred in instructing the jury under CALCRIM No. 1190: “Conviction of a sexual assault crime may be based upon the testimony of a complaining witness alone.” Appellant maintains instructing the jury under CALCRIM No. 1190 “propp[ed] up the testimony of a complaining witness in a sex offense case with extra support,” lightening the prosecution’s burden of proof. He notes that the jury had already been generally instructed under CALCRIM No. 301: “The testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence.”

In *People v. Gammage* (1992) 2 Cal.4th 693 (*Gammage*), the California Supreme Court rejected this argument. The court concluded that instructions substantially similar to CALCRIM Nos. 1190 and 301 did not “create a preferential credibility standard for the complaining witness, or somehow suggest that that witness is entitled to a special deference.”¹² (*Gammage*, at p. 701.) The court explained: “Although the two instructions overlap to some extent, each has a different focus. [CALCRIM No. 301] focuses on how the jury should evaluate a fact . . . proved solely by the testimony of a single witness. It is given with other instructions advising the jury how to engage in the

¹² At issue in *Gammage* were CALJIC No. 10.60 (“ ‘It is not essential to a conviction of a charge of rape that the testimony of the witness with whom sexual intercourse is alleged to have been committed be corroborated by other evidence.’ ”) and CALJIC No. 227 (“ ‘Testimony as to any particular fact which you believe given by one witness is sufficient for the proof of that fact. However, before finding any fact required to be established by the prosecution to be proved solely by the testimony of such a single witness, you should carefully review all the testimony upon which the proof of such fact depends.’ ”). (*Gammage, supra*, 2 Cal.4th at pp. 696-697, italics omitted.)

fact-finding process. [CALCRIM No. 1190], on the other hand, declares a substantive rule of law, that the testimony of the complaining witness need not be corroborated. It is given with other instructions on the legal elements of the charged crimes.” (*Gammage*, at pp. 700-701.) Thus, “[t]he one instruction merely suggests careful review when a fact depends on the testimony of one witness. The other tells the jury there is no legal corroboration requirement. Neither eviscerates or modifies the other. . . . ‘There was no singling out of the testimony of the prosecuting witness with a view of giving it undue prominence before the jury.’ [Citation.] Nor do the instructions ‘dilute[] the “beyond a reasonable doubt” standard.’ [Citation.] The instructions in combination are no less correct, and no less fair to both sides, than either is individually.” (*Gammage*, at p. 701.)

Appellant contends the court in *Gammage* “answered the wrong question,” focusing improperly on the need to inform jurors that no corroboration is required, when “[t]he correct question is why, especially by 2011 when this case was tried, any juror would be expected to be aware of and to adhere to the long-since-discarded legal concepts surrounding rape charges, or other sexual assault charges” In *Gammage*, the court noted prior decisions explaining the special features of rape that make an instruction on corroboration proper. (See *Gammage, supra*, 2 Cal.4th at p. 697, quoting *People v. McIntyre* (1981) 115 Cal.App.3d 899, 907 [“ ‘The proof of the elements of [rape] often turns on a credibility contest between the accused and the accuser alone, since the act is most often committed in private [citation]. Permitting a jury to operate under the misconception corroboration is required would put the value of the victim’s testimony on a level below that of the defendant’s testimony, credibility aside, and that is not the law.’ [Citation.]”]; *Gammage*, at p. 699, quoting *People v. Blassingill* (1988) 199 Cal.App.3d 1413, 1422 [“ ‘Although . . . there may be less likelihood today . . . that a jury would mistakenly believe the law required a rape victim’s testimony be corroborated, there remains the very strong likelihood that a rape victim who survived the attack without “benefit” of corroborating physical injuries or who delayed in reporting the offense would find her testimony the subject of vigorous attack in cross-examination and in defense argument simply because of this absence of corroborating evidence.’ ”];

Gammage, at pp. 699-700, quoting *People v. Hollis* (1991) 235 Cal.App.3d 1521, 1525 [problem of “balancing a criminal defendant’s right to a fair trial with a rape victim’s right to testify against her assailant without being subjected to unnecessarily intrusive or suggestive means of testing her credibility”].)

The court in *Gammage* concluded CALJIC No. 10.60, similar to CALCRIM No. 1190, “continues to perform an important role. [¶] Although the ‘historical imbalance between victim and accused in sexual assault prosecutions’ has been partially redressed in recent years [citation], there remains a continuing vitality in instructing juries that there is no legal requirement of corroboration. Further, even if we were to assume, which we do not, that all juries are aware of the no-corroboration requirement, or would glean it from [CALCRIM No. 301] itself, no harm is done in reminding juries of the rule. [¶] The jury is instructed that the prosecution must prove its case beyond a reasonable doubt. This places a heavy burden of persuasion on a complaining witness whose testimony is uncorroborated. [CALCRIM No. 1190] does not affect this instruction but . . . when all the instructions are given, ‘a balance is struck which protects the rights of both the defendant and the complaining witness.’ ” (*Gammage*, at p. 701.) Noting that “trials of sex crimes, which often are a credibility contest between the accused and the accuser, have ‘special features which make such an instruction on lack of corroboration most proper,’ ” the court held it proper “for the trial court to give [CALCRIM No. 1190] in addition to [CALCRIM No. 301] in cases involving sex offenses.” (*Gammage*, at p. 702.)

II. Sentencing Error

The court imposed the following “determinate consecutive sentence[s]:” a term of eight years on count 6 (rape), eight years on count 8 (rape), eight years on count 10 (sodomy), and six years on count 12 (burglary).¹³ Appellant contends it was error to

¹³ All undesignated section references are to the Penal Code.

The court also sentenced appellant to concurrent terms of eight years each on counts five (rape) and seven (rape), as those offenses “were not . . . clearly enough separate in time to warrant consecutive sentencing,” and imposed a concurrent six-year term on

sentence him to six years on count 12 because the record shows the trial court sentenced this count as a consecutive subordinate term under section 1170.1, which provides for a sentence of one-third of the middle term, 16 months. (§ 461.) In considering appellant’s assertion of error, a brief discussion of the sentencing schemes of sections 1170.1 and 667.6 is useful.

“Section 1170.1 sets forth the general sentencing scheme for multiple convictions.” (*People v. Belmontes* (1983) 34 Cal.3d 335, 343-344 (*Belmontes*)). Under subdivision (a) of this section, when any person is convicted of two or more felonies and a consecutive term of imprisonment is imposed, the aggregate term of imprisonment for all such convictions is “the sum of the principal term, the subordinate term and any additional term imposed The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed” (Stats. 2010, ch. 256, § 7.)

“Section 667.6, subdivision (c) is . . . a much harsher sentencing measure than section 1170.1,” and applies to certain specified sex offenses. (*Belmontes, supra*, 34 Cal.3d at p. 344.) The subdivision states in pertinent part: “In lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation of an offense specified in subdivision (e) [which includes rape (§ 261, subd. (a)(2)) and sodomy (§ 286, subd. (c)(2))] if the crimes involve the same victim on the same occasion. A term may be imposed consecutively pursuant to this subdivision if a person is convicted of at least one offense specified in subdivision (e).” Subdivision (d) is similar to subdivision (c) in all respects except that it provides: “A full, separate, and consecutive term shall be imposed for each violation of an offense specified in

count three (burglary). In addition, the court imposed consecutive indeterminate terms of 25 years to life on count four (rape), and 25 years to life on count nine (rape). (§ 667.61, subds. (a), (c)(1) & (6).) The court stayed the sentences on count two (kidnapping) and count eleven (false imprisonment) under section 654.

subdivision (e) if the crimes involve separate victims or involve the same victim on separate occasions.” (§ 667.6, subd. (d); *Belmontes*, at p. 343.)

Appellant argues that the clerk’s minutes identify count six (rape) as the principal term, indicating the court sentenced this count under section 1170.1 and that count twelve was therefore a consecutive subordinate term that must be calculated at one-third of the mid-term for the offense, 16 months. (See *Belmontes*, *supra*, 34 Cal.3d at p. 346 [a court may opt to have a sex offense as the principal term if it carries the longest sentence and to treat all other offenses “as subordinate terms under section 1170.1”].)

Appellant is mistaken. The record demonstrates that the trial court sentenced counts six, eight, and ten under section 667.6. Noting appellant had time for reflection after committing these offenses, the court stated that they “should be sentenced fully and consecutively as required by” section 667.6.¹⁴ (See § 667.6, subd. (d) [mandating full, separate, and consecutive terms for each violation if the crimes involve the same victim on separate occasions]; *ibid.* [“In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior”].) The court indicated it “would choose consecutive sentencing for those particular crimes” even if it were not mandatory, indicating it would exercise its discretion under subdivision (c) to impose full, separate, and consecutive terms even if section 667.6, subdivision (d) did not apply.

Although the clerk’s minutes state that count six was the principal term, suggesting the court sentenced this count under section 1170.1, the court never specifically stated that count six was the principal term, and, as discussed above, the record definitively shows this count was sentenced under section 667.6. “Where there is a discrepancy between the oral pronouncement of judgment and the minute order . . . , the oral pronouncement controls. [Citations.]” (*People v. Zackery* (2007) 147 Cal.App.4th

¹⁴ The trial court actually referenced “section 665.6,” which does not exist. It is clear the court meant to refer to section 667.6.

380, 385; see *id.* at p. 388 [“the clerk’s minutes must accurately reflect what occurred at the hearing”].)

The trial court therefore properly imposed a full term consecutive sentence on count 12, the only non-sex offense subject to a determinate sentence. (See *Belmontes*, *supra*, 34 Cal.3d at p. 346 [“The computations under sections 1170.1 and 667.6, subdivision (c) are to be done separately; the total of the section 667.6 computation would then be added to the section 1170.1 total.”].)¹⁵

DISPOSITION

The judgment is affirmed.

SIMONS, Acting P.J.

We concur.

NEEDHAM, J.

BRUINIERS, J.

¹⁵ The trial court considered sentencing appellant under section 1170.1 on the burglary counts (counts three and twelve), but opted to order a concurrent sentence on count three instead, making section 1170.1 inapplicable. (See § 1170.1 [applicable “when any person is convicted of two or more felonies . . . and *a consecutive term of imprisonment is imposed*”], italics added.) The court appears to have sentenced count 12 under section 1170. (§ 1170 [option of upper, middle, or lower term]; § 461.)