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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

DOMINGO GARCIA VARGAS,

Defendant and Appellant.

C067801

(Super. Ct. No. 09F05780)

Defendant Domingo Garcia Vargas appeals his conviction after a jury found him guilty of forcible rape and false imprisonment of one victim, and forcible sexual penetration and assault with intent to commit forcible sexual penetration of another.

Defendant contends the trial court committed prejudicial error when it gave the jury a special instruction defining “sexual penetration,” and when it failed to instruct on sexual battery as a lesser included offense to forcible sexual penetration. He further contends the trial court erroneously permitted multiple convictions for forcible sexual penetration and the lesser included offense of assault to commit forcible sexual penetration, requiring that the conviction for the lesser offense be vacated. In the

alternative, he claims the trial court should have stayed the conviction for the lesser offense pursuant to Penal Code section 654, and failure to do so violated double jeopardy. (Unspecified section references that follow are to the Penal Code.) Finally, he claims there are various clerical errors in the abstract of judgment which require correction.

We agree with defendant's contention regarding multiple convictions and will reverse the conviction for assault to commit forcible sexual penetration. We will also direct the trial court to modify the abstract of judgment to correct specified errors, and will otherwise affirm the judgment.

FACTS AND PROCEEDINGS

The charges against defendant arose out of the following assaults against two different victims, K.B. and S.G.:

K.B.

On January 24, 2009, K.B. and several of her friends went to a bar called Badlands to celebrate a friend's birthday. K.B. had a couple of drinks at Badlands, then she and a friend left and went to a nearby liquor store, where they purchased a small bottle of liquor. They went to the car and K.B. drank about five shots. After about a half hour, they left to meet some friends parked at a nearby parking lot. They talked there for a bit, then K.B. returned to Badlands. She had nothing else to drink.

At approximately 1:00 a.m., K.B. walked back to the parking lot to say goodbye to her friends. However, as she neared the railroad tracks, she noticed their car was already gone. Suddenly, defendant grabbed her from behind, shoved her into a nearby parking lot and pushed her to the ground between two parked cars. K.B. landed on her back. Defendant pinned her down, straddling her with both of his hands on her chest. K.B. later testified, "I was definitely intoxicated, but I wouldn't say I was drunk. . . . [¶] . . . I was aware of my surroundings." She screamed and struggled to get away, and asked defendant "if this was seriously happening." In response, defendant punched her three

times in the face. The third strike caused K.B.'s head to hit the ground "pretty hard." She did not have a clear memory of what happened after that.

When K.B. came to, defendant was gone and she was still lying on her back on the ground with her pants down around her left ankle. One of her shoes was off and her underpants were missing. K.B. got dressed and, although she could not later recollect how, she met up with her friend Jacob and walked with him to his house where they met up with another friend, Wendy. K.B. told Wendy she was raped, and Wendy took her to the hospital.

K.B. had a large, painful bump and a scab on the back of her head, a black eye, an orbital fracture under her left eye, her nose and lips were swollen, and she had a cut on her lower lip, and bruising and swelling above her upper lip.

K.B. reported to the police that defendant had vaginal intercourse with her for about five minutes. A sexual assault examination revealed an abrasion on K.B.'s left labia minora and posterior forchette. Genetic testing on swabs taken from her vagina contained sperm matching defendant's DNA profile.

S.G.

On the evening of June 6, 2009, S.G. went with her boyfriend to meet some friends at the Stoney Inn, a restaurant and bar. At approximately 1:00 a.m., S.G. walked out to her car to have a cigarette, drink some water, and text her sister. S.G. later testified that she "had a buzz going," and stated, "I wasn't intoxicated to the point where I didn't know what was going on. I was definitely functional."

S.G. fell asleep sitting in the driver's seat of her car. When she woke up, defendant was sitting in the front passenger seat with his hand over her mouth. He leaned over and put his body weight on her, with his forearm pressing against her throat and his hand over her nose and mouth, making it difficult for her to breathe. S.G. struggled to

get away. Defendant lifted her dress, put his hand between her legs, moved her underwear to the side, and twice touched her “vaginal region.”

S.G. eventually freed her arms and was able to honk the car horn. Defendant released his grip long enough for her to open the door and throw herself out of the car, screaming for help. Defendant climbed out of the car and fled across the street on his bike.

Jonathan Markus, a security guard for the Stoney Inn, was standing outside smoking a cigarette when S.G. walked to her car. According to Markus, S.G. appeared “slightly intoxicated” but she was not stumbling or falling over. Markus got into his patrol vehicle and made his rounds. As he returned to the Stoney Inn, he saw S.G. quickly exit her car, “acting hysterically” and screaming. Markus later told police he thought he heard S.G. scream, “He took my purse. He took my purse.” Markus saw defendant exit the passenger side of S.G.’s car, grab a bicycle, and ride away. Markus gave chase in his car, cornering defendant in an alley. Defendant dropped his bike and backpack and continued to flee on foot. Markus continued his pursuit until he lost sight of defendant.

A hat and a pair of scissors were discovered in S.G.’s car. Genetic testing on cuttings taken from the hat contained DNA matching defendant’s profile.

S.G. told police defendant put his fingers in her vagina but “did not penetrate” her. Detective Andrew Newby testified that, after reading the patrol officer’s statement, it was unclear to him to what extent, if any, penetration occurred. Newby interviewed S.G. and attempted to clarify with her, “talking about the difference between penetration and nonpenetration and the vaginal folds.” They discussed the female anatomy. In particular, Newby “discussed with [S.G.] vaginal folds, inner and outer, the labial folds,” and asked S.G. where defendant put his hands or fingers. S.G. said defendant “touch[ed] her vaginal region,” and twice “got his finger or fingers in between her labial folds” or “penetrate[d] the vaginal fold.”

Defendant testified at trial. He admitted grabbing K.B. from behind, putting his hand over her mouth, throwing her to the ground, hitting her three times in the face, taking off her pants, and forcing her to have sexual intercourse with him against her will. He denied pulling K.B. from the sidewalk into the parking lot, claiming she was already in the parking lot when he grabbed her and raped her.

Defendant admitted seeing S.G. slumped over the steering wheel of her car while he was riding his bicycle, and that the hat found inside S.G.'s car was his, but denied ever getting into S.G.'s car or assaulting her.

As to K.B., the amended complaint deemed the information charged defendant with kidnapping with intent to commit rape (§ 209, subd. (b)(1)--count one), and forcible rape (§ 261, subd. (a)(2)--count two). As to count one, the amended complaint specially alleged defendant personally inflicted great bodily injury (§ 12022.7, subd. (a)), and as to count two, the amended complaint specially alleged defendant kidnapped the victim (§ 667.61, subd. (d)(2), and § 667.61, subd. (e)(1)), personally inflicted great bodily injury (§ 667.61, subd. (e)(3), and § 12022.8) and committed the offense against multiple victims (§ 667.61, subd. (e)(5)).

With regard to S.G., the amended complaint charged defendant with two counts of forcible sexual penetration (§ 289, subd. (a)(1)--counts three and four), assault with intent to commit forcible sexual penetration (§ 220/§ 289, subd. (a)--count five), and assault with intent to commit rape (§ 220/§ 261, subd. (a)(2)--count six). As to counts three and four, the amended complaint specially alleged defendant committed the offenses against multiple victims (§ 667.61, subd. (e)(5)).

The jury found defendant not guilty of kidnapping to commit rape (count one), but guilty of the lesser included offense of false imprisonment (§ 236), and found true the special allegation that defendant personally inflicted great bodily injury during commission of the crime. The jury further found defendant guilty of forcible rape (count two), and found true the special allegations that he personally inflicted great bodily injury

within the meaning of sections 667.61, subdivision (e)(3) and 12022.8, and committed the offense against multiple victims. The jury also found defendant guilty of forcible sexual penetration (count three), finding true the special allegation that he committed the offense against multiple victims, and found him guilty of assault with intent to commit forcible sexual penetration (count five). However, the jury was unable to reach verdicts on counts four and six, and those counts were dismissed in the interest of justice.

The trial court sentenced defendant to 25 years to life for count two, plus a consecutive term of 15 years to life for count three and a consecutive term of six years for count five, for an aggregate state prison term of 40 years to life plus six years. The trial court also imposed a three-year term for count one and a three-year term for the section 12022.7, subdivision (a), enhancement, both of which were stayed pursuant to section 654.

DISCUSSION

I

Jury Instructions

Defendant contends the trial court committed error when it instructed the jury with a special instruction defining “sexual penetration.” Defendant also contends the trial court failed to instruct the jury on sexual battery as a lesser included offense of forcible sexual penetration. We reject both of these contentions.

A. Special Instruction Defining “Sexual Penetration”

Defendant was charged with violating section 289, subdivision (a)(1) (hereafter section 289(a)(1)), which makes criminal the act of “sexual penetration” committed against a victim by force, violence, duress, menace, or fear of immediate and unlawful bodily injury.

CALCRIM No. 1045, as given to the jury, defined “sexual penetration” as “penetration, however slight, of the genital or anal opening of the other person for the purpose of sexual abuse, arousal, or gratification.”

At the prosecution’s request, and over defendant’s objection, the trial court specially instructed the jury as follows: “The labia majora form the external boundaries of the female genitalia. Contact with the female genitalia inside the exterior of the labia majora constitute[s] sexual penetration of the female genital opening within the meaning of Penal Code [s]ection 289(a)(1). Actual penetration of the vaginal opening is not required.” The language of the special instruction was formulated from language found in *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1366-1371.

Defendant contends the statutory definition of “sexual penetration” provided in CALCRIM No. 1045 was adequate, and there was a reasonable likelihood the jury would misinterpret the special instruction.

The People argue use of the special instruction was proper to provide the jury with guidance regarding whether defendant penetrated S.G.’s “genital opening” for purposes of CALCRIM No. 1045. We agree with the People.

It is well settled that, “even in the absence of a request, a trial court must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury’s understanding of the case.” (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.)

“A trial court’s duty is not always adequately performed by merely reading to the jury the wholly correct requested instructions; it is that court’s duty to see to it that the jur[ors] are adequately informed on the law governing all elements of the case submitted to them to an extent necessary to enable them to perform their function in conformity with the applicable law.” (*People v. Sanchez* (1950) 35 Cal.2d 522, 528.)

An appellate court reviews instructions given by the trial court “to determine whether there is a reasonable likelihood that the jury would have understood them

correctly.” (*People v. Battle* (2011) 198 Cal.App.4th 50, 70.) A special instruction is not judged in isolation, but rather is considered in context with the instructions as a whole and the trial record. (*Ibid.*; *Estelle v. McGuire* (1991) 502 U.S. 62, 72 [116 L.Ed.2d 385, 399].) Any defect in one instruction may be cured by another instruction or the instructions as a whole. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016.)

Here, defendant was charged with forcible sexual penetration (§ 289(a)(1)) requiring that the jury find he committed the act of “sexual penetration” against S.G. At trial, S.G. testified defendant put his fingers “inside [her] vagina but not inside. Inside the labia, not inside the vaginal opening.” Using a diagram, she identified where defendant touched her by pointing to the area “along the labia minora and on the inside of the labia majora.” She stated defendant “just barely” touched the area of the opening of the vagina, and got his fingers in between her labial folds and around the area of the opening of vagina at least twice.

The trial court instructed the jury with CALCRIM No. 1045 which defines the term “sexual penetration” as “penetration, however slight, *of the genital . . . opening of the other person. . .*” (Italics added.) Given the ambiguity of the term “genital opening” in the form instruction, particularly in light of the evidence here, where S.G. testified defendant put his fingers “in between her labial folds” but did not put his fingers inside her “vaginal opening,” the special instruction defining sexual penetration of the genital opening for purposes of section 289(a)(1) as “[c]ontact with the female genitalia inside the exterior of the labia majora” not requiring “[a]ctual penetration of the vaginal opening” was necessary for the jury’s understanding of the elements necessary to convict defendant of forcible sexual penetration.

Defendant avers that CALCRIM No. 1045’s “clear and simple definition of sexual penetration” was likely confused by the special instruction. In particular, he argues the jury likely misinterpreted the special instruction because the phrase “actual penetration of the vaginal opening is not required” is only correct if the term “vagina” is understood in

its technical sense, that is, “an interior component of the female genitalia,” and not when understood in its common, everyday sense, that is, where the term “simply refers to the female genitalia.” As such, he argues, CALCRIM No. 220, which requires that words not otherwise defined be given their ordinary, commonsense meaning, compelled the jury to interpret the undefined term “vaginal opening” to mean “genital opening,” thus confusing the evidence required to convict him under section 289(a)(1) by suggesting that evidence of actual penetration of the genital opening is not required. Defendant’s attempt to obfuscate the issue is unavailing.

S.G. told Newby during an interview, and later testified at trial, that defendant put his fingers “in between her labial folds,” and in fact touched her “along the labia minora and on the inside of the labia majora.” The special instruction clearly explained that such contact inside the labia majora constitutes sexual penetration of the female genital opening for purposes of section 289(a)(1) which is a correct statement of the law. The special instruction was also clear in differentiating between evidence of penetration of the genital opening and evidence of penetration of the opening of the vagina, or the “vaginal opening.” Indeed, in light of the evidence presented, and consistent with the language of the special instruction, it was irrelevant whether defendant in fact penetrated S.G.’s “vaginal opening” for purposes of convicting defendant under section 289(a)(1).

Viewing the jury instructions as a whole, we find no reasonable likelihood the jury misunderstood the instructions or was confused or misled about whether defendant committed forcible sexual penetration of S.G. There was no error.

B. Instruction on Sexual Battery as a Lesser Included Offense

Defendant asserts the trial court had a sua sponte duty to instruct on misdemeanor sexual battery as a lesser included offense of forcible sexual penetration.

Sua sponte instructions on possible lesser included offenses are required only when there is substantial evidence that, if the defendant is guilty at all, he is guilty of the

lesser offense, but not the greater. (*People v. Huggins* (2006) 38 Cal.4th 175, 215; *People v. Mendoza* (2000) 24 Cal.4th 130, 174; *People v. Thomas* (2012) 53 Cal.4th 771, 813.) “ ‘This substantial evidence requirement is not satisfied by “ ‘any evidence . . . no matter how weak,’ ” but rather by evidence from which a jury composed of reasonable persons could conclude “that the lesser offense, but not the greater, was committed.” ’ ” (*People v. Verdugo* (2010) 50 Cal.4th 263, 293.)

In determining whether the trial court improperly failed to instruct on a claimed lesser included offense, we apply a *de novo* standard of review. (*People v. Licas* (2007) 41 Cal.4th 362, 366; *People v. Verdugo, supra*, 50 Cal.4th at p. 293.)

Here, we need not reach the issue of whether misdemeanor sexual battery is a lesser included offense of forcible sexual penetration in light of the fact that we find no substantial evidence to support giving an instruction on misdemeanor sexual battery. S.G. testified unequivocally that although defendant did not put his fingers inside her vaginal opening, he did put his fingers “[i]nside the labia.” Using a diagram, she identified where defendant touched her by pointing to the area “along the labia minora and on the inside of the labia majora.” She stated defendant “just barely” touched the area of the opening of the vagina, and got his fingers in between her labial folds and around the area of the vaginal opening at least twice. This evidence was sufficiently strong to obviate any need to instruct the jury on misdemeanor sexual battery as a lesser included offense.

Even if substantial evidence had supported giving such an instruction, the trial court’s failure to do so did not prejudice defendant considering the court’s instruction on four other lesser offenses: attempted forcible sexual penetration, assault with intent to commit forcible sexual penetration, simple assault, and simple battery. Had the jury believed defendant failed to actually accomplish penetration of S.G.’s genital opening, it would have found defendant guilty of one of the lesser offenses accordingly. “Error in failing to instruct the jury on a lesser included offense is harmless when the jury

necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions.” (*People v. Lewis* (2001) 25 Cal.4th 610, 646.)

Defendant argues S.G.’s statements to police that defendant “did not penetrate” her, and that she was “sure he did not penetrate” her, are substantial evidence she was not sexually penetrated. The argument is unavailing, as it ignores not only S.G.’s more specific testimony at trial as to how and where defendant touched her, namely inside the labia majora and along the labia minora, but also the fact that, as the jury was instructed, forcible sexual penetration for purposes of section 289(a)(1) does not require “[a]ctual penetration of the vaginal opening.”

Any error in the trial court’s instruction of the jury was harmless.

II

Multiple Convictions

Defendant was convicted of both forcible sexual penetration (§ 289(a)(1)) and assault with intent to commit forcible sexual penetration (§§ 220/289(a)(1)) of K.B. He claims this was error, as the latter is a lesser included offense of the former. Because a person cannot be convicted of both a greater and a lesser included offense, he argues, the conviction for the lesser offense must be vacated. In the alternative, he claims the trial court should have stayed the conviction for the lesser offense pursuant to section 654, and failure to do so violated double jeopardy.

We agree that assault with intent to commit forcible sexual penetration is a lesser included offense of forcible sexual penetration and, as such, the conviction for the lesser assault offense must be reversed.

Our courts have long held that multiple convictions are prohibited where one offense is necessarily included in another. (*People v. Pearson* (1986) 42 Cal.3d 351, 355; *People v. Cole* (1982) 31 Cal.3d 568, 582.) “ ‘If the evidence supports the verdict as to a greater offense, the conviction of that offense is controlling, and the conviction of the

lesser offense must be reversed.’ ” (*Pearson*, at p. 355, quoting *People v. Moran* (1970) 1 Cal.3d 755, 763.)

“An offense is necessarily included within a charged offense ‘if under the statutory definition of the charged offense it cannot be committed without committing the lesser offense, or if the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified the lesser offense is necessarily committed.’ [Citation.]” (*People v. Dixon* (1999) 75 Cal.App.4th 935, 941.)

Here, the amended information alleged defendant violated section 289(a)(1) in that he “did unlawfully cause the penetration of the genital opening of [S.G.], for the purpose of sexual arousal, gratification, and abuse by a foreign object . . . and by an unknown object, accomplished by force, violence, duress, menace and fear of immediate and unlawful bodily injury on the victim.”

The amended information also alleged defendant violated sections 220 and 289(a)(1) in that he “did unlawfully assault [S.G.], with the intent to commit the penetration of the genital opening of another by a foreign object, in violation of Penal Code Section 289.”

“Assault” is defined as “an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” (§ 240.) “ ‘[V]iolent injury’ is held to include any wrongful act committed by means of physical force even though that force entails no pain or bodily harm. [Citations.]” (*People v. Carapeli* (1988) 201 Cal.App.3d 589, 595, fn. 3.)

The allegations in the amended information describe the charge of forcible sexual penetration in such a way that if committed in the manner described, the offense of assault with intent to commit forcible sexual penetration must necessarily be committed. (*In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477.) That is, as here, where defendant committed forcible sexual penetration when he unlawfully penetrated S.G.’s genital opening by touching her inside her labia majora and along her labia minora with his

finger(s) by force and for the purpose of sexual arousal and gratification, defendant also committed assault with intent to commit forcible sexual penetration by his unlawful attempt, coupled with his present ability, to commit a violent injury (that is, “a wrongful act committed by means of physical force” (*People v. Carapeli, supra*, 201 Cal.App.3d at p. 595, fn. 3)) on S.G. Thus, the assault offense is a lesser included offense of forcible sexual penetration.

The People argue the assault offense is not a lesser included offense because a person can commit forcible sexual penetration without committing assault with intent to commit forcible sexual penetration. For example, they urge, if a defendant forces a victim to penetrate the defendant’s or another person’s genital opening, the defendant commits forcible sexual penetration (§ 289(a)(1)) but does not commit the assault offense (§ 220) because the defendant is not the one who committed the violent injury on another.

The example presented by the People is foreclosed by the allegations in the accusatory pleading, as the amended information alleges that it was defendant who penetrated the victim’s genital opening. Thus, the lesser offense is necessarily committed.

The accusatory pleading similarly forecloses the People’s argument that certain methods of causing duress (e.g., implied threats, psychological coercion, and taking advantage of a special relationship) are “insufficient means to constitute an attempt to cause a violent injury.” Here, the amended information alleges that defendant overcame S.G.’s will “by force, violence, duress, menace and fear of immediate and unlawful bodily injury on the victim.”

Finally, we note that, while not an issue in the case, the court in *People v. Dillon* (2009) 174 Cal.App.4th 1367, treated as a foregone conclusion the fact that assault with intent to commit forcible sexual penetration is in fact a lesser included offense of forcible sexual penetration. (*Id.* at pp. 1375-1384.)

In light of the defendant's conviction for forcible sexual penetration (count three), the conviction for the lesser included offense of assault with intent to commit forcible sexual penetration (count five) is reversed. Having so decided, we need not reach defendant's alternative claims.

III

Correction of Abstract of Judgment

Defendant asserts the abstract of judgment erroneously lists the offense of conviction for count five as "assault with intent to commit rape" (as opposed to "assault with intent to commit sexual penetration by force"). This claim has been rendered moot by our determination, as set forth in part II of this opinion, *ante*, that defendant's conviction of assault with intent to commit forcible sexual penetration (count five) must be reversed.

Defendant also claims the abstract erroneously lists the total custody credits as 604 (as opposed to 694). The People correctly concede this claim and do not oppose defendant's request that we correct the abstract under our inherent power to correct clerical errors to conform the record to the true facts. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185; *People v. Schultz* (1965) 238 Cal.App.2d 804, 807; *People v. Flores* (1960) 177 Cal.App.2d 610, 613.) We accept the People's concession and direct the trial court to amend the abstract to reflect total credits of 694.

DISPOSITION

The judgment is modified to reverse the conviction of assault with intent to commit sexual penetration (count five). As modified, the judgment is affirmed. The trial

