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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ORLAGH ANN BEWLEY et al.,

Defendants and Appellants.

D0057761

(Super. Ct. No. RIF134818)

APPEALS from judgments of the Superior Court of Riverside County, Jean Pfeiffer Leonard, Judge. Affirmed as modified in part, reversed in part and remanded.

Orlagh Ann Bewley, Eddie José Huerta and Eugene Daniel Flock appeal judgments convicting them of multiple criminal offenses committed during a physical and sexual assault on K.S. Bewley complains of instructional error, and she and Flock complain of sentencing errors. Huerta contends the trial court erroneously denied his motion to withdraw his guilty plea, and, alternatively, seeks modifications of the judgment as to orders concerning victim restitution and a certain fine.

We affirm Bewley's and Flock's convictions, reverse their sentences and remand for resentencing. We modify the judgment against Huerta and affirm it as modified.

I

FACTUAL BACKGROUND

K.S. met Bewley when a common friend invited him to a party at Bewley's house in Riverside. Over the next few days, K.S. and Bewley spent time together, both at her house and at his house in Victorville. The two smoked methamphetamine together, "fooled around," and Bewley gave K.S. "oral sex." Bewley subsequently told Flock and another friend, Amber Robles, that K.S. had raped her.

The next day, K.S. went to Bewley's house at approximately 10:00 p.m., and was greeted in the driveway by Robles, Huerta and José Zepeda. They took K.S. to a bedroom where Flock and three other men were present and made K.S. sit in a chair. Flock, Zepeda and the three other men paced in front of K.S., pounding fists into their palms. They told K.S. he "f**ked up," they "hate rats" and he was "disrespectful of women."

At Robles's bidding, Huerta attempted to take a gold chain off K.S.'s neck and a ring off K.S.'s finger. When K.S. resisted, Robles struck him in the abdomen, dropping him to the ground. Huerta took the necklace, the ring, K.S.'s car keys and other objects from K.S.'s pockets, and gave them to Robles. Robles kicked K.S. in the side and told him to get back in the chair.

After K.S. had been in the bedroom for approximately one hour, Robles told Flock to summon Bewley from another room. When Bewley entered the bedroom, K.S.

"begged her to stop all of what was going on." Bewley walked over to K.S., called him "a piece of shit" and "a rat bitch," and spat in his face. When Robles asked Bewley what they should do to K.S., Bewley responded, "Make him your bitch."

Flock, Zepeda and the other men closed in on K.S. and kept on striking fists against their palms. Robles ordered K.S. to disrobe, and he stripped down to his underwear. Robles directed K.S. to remove his underwear and struck him in the abdomen when he refused. K.S. then removed his underwear and lay prostrate on the floor as Robles directed him. Zepeda used his foot to force K.S.'s head down when K.S. tried to look up, and Bewley kicked K.S. on the top and side of his head. Others kicked K.S. in the ribs and abdomen.

After K.S. had been in the bedroom for approximately two hours, Robles, Bewley and the others took a break from their assault on K.S. for 10 to 15 minutes to smoke methamphetamine. Robles burned K.S.'s back with the pipe she and the others were using to smoke methamphetamine; and when K.S. rolled on the floor in pain, the others laughed. Bewley used the methamphetamine pipe to burn K.S. on his abdomen, and Flock used it to burn K.S. behind an ear. K.S. arose from the floor and begged Bewley to make the others stop hurting him, but Bewley kept on calling him a "piece of shit," and the others forced him back to the floor.

Robles asked Bewley "if that was enough," and Bewley responded no. Robles then knelt on K.S.'s back, and a sock was shoved into his mouth to prevent him from screaming. Someone told Robles to "carve nigger in [K.S.'s] back." Robles used what felt to K.S. "like a mix between a knife and a cheese grater" to cut K.S.'s lower back and

buttocks for approximately half an hour. K.S. writhed in pain and tried to break free, but Robles and Flock subdued him.

After Robles finished cutting K.S., Bewley left the bedroom and returned with a dress, which Robles forced K.S. to don. K.S. was again made to lie prostrate on the floor, and Robles jumped on his back approximately 10 times while the others laughed.

Next, Robles told Huerta to fetch a dildo, and someone poured a warm liquid on K.S. as Bewley said, "Lube him up." K.S. saw a dildo, which was 10 to 12 inches long and up to two inches thick. As Flock held K.S.'s torso down, Robles spread K.S.'s legs and tried to insert the dildo into his rectum five or six times. K.S. felt pain, which he rated as eight or nine on a scale of one through 10. Robles and Flock then switched places, and Flock tried to push the dildo into K.S.'s rectum. K.S. again felt intense pain.

Robles asked Bewley a second time "if it was enough." Bewley said no, so Robles called for a broomstick. While Flock held K.S.'s torso down, Robles "josted" K.S. with the broomstick "in [his] rear end" five or six times. Bewley then kicked K.S. in the head twice.

By this time, K.S. had been kept in the bedroom for approximately four or five hours. He thought his assailants were going to kill him, so he began begging for his life and contrived a ruse to escape. K.S. falsely told his assailants he had \$4,700 buried in his backyard, which he would give them if they would let him go. Upon hearing this, Robles and the others stopped assaulting K.S. Robles told K.S. to remove the dress and put his clothes back on, and Huerta and Zepeda led K.S. out to the living room.

Robles left the house and returned a half hour later with a bill of sale for K.S. to sign over his vehicle to her. K.S. gave Flock directions to his house in Victorville, and Robles and Flock departed in K.S.'s vehicle to retrieve the \$4,700 K.S. told them he had buried in the backyard. Bewley then entered the room with a set of chains and locks and said, "Chain him up in this so he doesn't escape." Huerta and two other men bound K.S.'s wrists and ankles with the chains and kept watch over him.

Some hours later, Robles and Flock telephoned that they were very angry because they had been digging in K.S.'s backyard but had not found the money. They threatened K.S. that "if they had to come back down without finding the money, [he] was done." K.S. suggested they transport him to his house, and a man named Larry subsequently arrived at Bewley's residence to drive K.S. to his house in Victorville.

While Larry and K.S. were travelling in the car together, K.S. agreed to give Larry \$500 if he would not take K.S. to Victorville. K.S. then telephoned his girlfriend to arrange to get the \$500 and directed Larry to the shop where she worked. When they arrived at the shop, K.S. escaped from the vehicle and ran into the shop. His girlfriend telephoned the police.

K.S. gave a police detective a statement describing his assault at Bewley's house and then sought medical attention. A nurse examined K.S. and found injuries all over his body, including bruises on his head, neck, torso and limbs; lacerations on his lower back; and burns on his abdomen, left buttock, lower back and behind his right ear. The nurse also found bruises around K.S.'s anus and blood in his rectum.

In the meantime, Flock and Robles waited at K.S.'s house for him to arrive and show them where the \$4,700 was buried. Flock and Robles "ransack[ed]" the house and stole several items. They later drove back to Riverside and unloaded the booty at Bewley's house.

The following day, K.S. went to Bewley's house accompanied by the police. K.S. identified his vehicle and the items Flock and Robles had stolen from his house. K.S. also identified his five assailants, who were arrested.

II

PROCEDURAL BACKGROUND

A. *The Charges*

The People filed an information charging Bewley, Huerta and Flock with the following crimes: count 1, torture (Pen. Code, § 206);¹ count 2, sexual penetration by foreign object (§ 289, subd. (a)(1)); count 4, false imprisonment (§ 236); count 5, robbery (§ 211); and count 8, kidnapping (§ 207, subd. (a)).² The People charged Bewley and Flock in count 3 with assault with a deadly weapon (razor blade). (§ 245, subd. (a)(1).) In count 6, the People charged Huerta and Flock with burglary. (§ 459.) Finally, the People charged Flock in count 7 with grand theft auto. (Veh. Code, § 10851, subd. (a).)³

¹ Subsequent undesignated section references are to the Penal Code.

² Count 4 was later dismissed as a lesser included offense of count 8.

³ The People also charged Robles and Zepeda with some or all of these offenses. We do not discuss the charges against them or the resolution of those charges because neither Robles nor Zepeda is a party to this appeal.

B. *The Jury Verdicts Against Bewley and Flock*

The case proceeded to trial against Bewley and Flock. Each defendant had a separate jury.

Bewley's jury found her guilty on counts 1 (torture), 2 (sexual penetration by foreign object), 3 (assault with a deadly weapon) and 8 (kidnapping). The jury found Bewley guilty of attempted robbery (§§ 211, 664) as a lesser included offense of count 5 (robbery).

Flock's jury found him guilty on counts 1 (torture), 2 (sexual penetration by foreign object), 5 (robbery), 6 (first degree burglary) and 7 (grand theft auto). The jury found Flock guilty of simple assault (§ 240) as a lesser included offense of count 3 (assault with a deadly weapon) and of false imprisonment (§ 236) as a lesser included offense of count 8 (kidnapping).

C. *Bewley's and Flock's Prison Sentences*

At sentencing, the court sentenced Bewley to prison for "life with a minimum of 10 years." The court first imposed an indeterminate prison term of "seven years to life" for the conviction on count 1 (torture) (§ 206.1).⁴ The court then turned to the determinate portion of the sentence and designated as "the principal and determinate term" a consecutive three-year term for the conviction on count 2 (sexual penetration by

⁴ The only punishment authorized by section 206.1 is "imprisonment in the state prison for a term of life." The sentencing court improperly incorporated a seven-year minimum parole eligibility period into the life sentence. (See § 3046, subd. (a)(1).) We note this is a common error.

foreign object, § 289, subd. (a)(1)). Finally, for Bewley's remaining convictions, the court imposed the following prison terms to be served concurrently with the term imposed for the count 2 conviction: (1) count 3 (assault with a deadly weapon) — three years (§ 245, subd. (a)(1)), stayed pursuant to section 654; (2) count 5 (attempted robbery) — 16 months (§§ 18, 213, subd. (b));⁵ and (3) count 8 (kidnapping) — three years (§ 208, subd. (a)).

The sentencing court also sentenced Flock to prison for "life with a minimum of 10 years." The court first imposed an indeterminate prison term of "seven years to life" for the conviction on count 1 (torture) (§ 206.1). (See fn. 4, *ante*.) The court then turned to the determinate portion of the sentence and designated as "the principal term" a consecutive three-year term for the conviction on count 2 (sexual penetration by foreign object) (§ 289, subd. (a)(1)). The court imposed the following prison terms to be served concurrently with the term imposed for the count 2 conviction: (1) count 3 (simple assault) — 180 days (§ 241, subd. (a)); (2) count 5 (robbery) — four years (§ 213, subd. (a)(1)(B)); (3) count 7 (grand theft auto) — two years (§ 18; Veh. Code, § 10851, subd. (a)); and (4) count 8 (false imprisonment) — two years (§§ 18, 237, subd. (a)), stayed pursuant to section 654.

⁵ Because the jury did not fix the degree of the attempted robbery in its verdict, it is deemed to be attempted second degree robbery. (§ 1157; *People v. Beamon* (1973) 8 Cal.3d 625, 629, fn. 2 (*Beamon*).)

No sentence was imposed for Flock's conviction on count 6 (first degree burglary).⁶

D. *Huerta's Guilty Plea and Sentence*

After the juries returned their verdicts against Bewley and Flock, Huerta pled guilty to counts 1 (torture), 5 (second degree robbery), 6 (first degree burglary),⁷ and 8 (kidnapping) pursuant to a plea agreement. Count 2 (sexual penetration by foreign object) was dismissed.

Huerta later moved to withdraw his guilty plea, on the grounds he "felt pressured" to accept the plea offer and did not understand the consequences of the plea with respect to "maximum exposure, parole terms, or conduct credit limitations." The trial court denied the motion.

In accordance with the plea agreement, the court sentenced Huerta to prison for a total indeterminate term of 14 years four months to life. The court imposed a determinate term of seven years four months, selecting the middle term of five years in prison on count 8 as the principal term (§§ 208, subd. (a), 1170.1, subd. (a)), and adding as consecutive subordinate terms one-third the middle term for the convictions on counts 5

⁶ Neither Flock nor the People addressed this omission in their initial briefs. We requested and have considered supplemental letter briefs on the issue.

⁷ Before Huerta pled guilty, the burglary charge had been dismissed against him for insufficient evidence. We requested and have considered supplemental letter briefs regarding the effect, if any, of the dismissal on the validity of Huerta's plea. We also requested and have considered supplemental letter briefs regarding the compliance of Huerta's guilty plea with section 1192.7.

(one year) and 6 (16 months) (§§ 213, subd. (a)(2), 461, subd. (a), 1170.1, subd. (a)).

The court also sentenced Huerta to a consecutive indeterminate term of life in prison on count 1 (§ 206.1), which requires a minimum period of confinement of seven years (§ 3046, subd. (a)(1)).

Huerta sought and obtained from the trial court a certificate of probable cause to prosecute an appeal from the order denying his motion to withdraw his guilty plea. (See § 1237.5.)

III

DISCUSSION

Bewley contends her conviction on count 2 (sexual penetration by foreign object) must be reversed because the trial court failed to perform its sua sponte duty to instruct on lesser included offenses. Bewley and Flock contend they must be resentenced on the convictions on count 2 because the trial court erroneously believed it had to impose consecutive prison terms for those convictions, and also contend the terms imposed for those convictions must be stayed under section 654. Huerta contends the trial court erred in denying his motion to set aside his guilty plea, and also erred in its sentencing orders regarding victim restitution and a fine. We shall address these contentions in turn.

A. *Any Error in Failing to Instruct on Lesser Included Offenses of Sexual Penetration by Foreign Object Was Harmless*

Bewley's primary argument on appeal is that her conviction of sexual penetration by foreign object (§ 289, subd. (a)(1)) must be reversed because the trial court failed to perform its sua sponte duty to instruct the jury on lesser included offenses. According to

Bewley, because the evidence of penetration was weak and there was some evidence of no penetration, the jury should have been given the option to convict her of attempted sexual penetration by foreign object (§§ 289, subd. (a)(1), 664), assault with intent to commit sexual penetration by foreign object (§ 220, subd. (a)(1)), battery (§ 242) or some other lesser included offense of sexual penetration by foreign object. Bewley further argues the instructional error was prejudicial because, without the error, she might have been convicted of a lesser offense for which the trial court could have granted her probation. (See § 1203.065, subd. (a) [prohibiting grant of probation to defendant convicted of violation of § 289, subd. (a)].) We disagree. Even if we assume (without deciding) that the trial court had a sua sponte duty to instruct on lesser included offenses, as we shall explain any such error was harmless.

Although a trial court must instruct on a lesser included offense that has substantial support in the evidence, whether the defendant wants the instruction or not (e.g., *People v. Rogers* (2006) 39 Cal.4th 826, 866-867), the failure to give a required instruction on a lesser included offense does not require automatic reversal. Rather, in noncapital cases, error in failing sua sponte to instruct fully on all lesser included offenses that are supported by the evidence must be reviewed for prejudice exclusively under *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*People v. Breverman* (1998) 19 Cal.4th 142, 178 (*Breverman*)). Under this standard, "[a] conviction of the charged offense may be reversed in consequence of this form of error only if, 'after an examination of the entire cause, including the evidence' (Cal. Const., art. VI, § 13), it appears 'reasonably probable' the defendant would have obtained a more favorable

outcome had the error not occurred" (*Breverman*, at p. 178.) "Such posttrial review focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*Id.* at p. 177.)

Application of this analysis to Bewley's claim of instructional error requires us to weigh the evidence supporting her conviction of sexual penetration by foreign object against the evidence that would support conviction of a lesser included offense. To convict Bewley on count 2, the People had to prove "penetration, *however slight*," of K.S.'s anus by foreign object. (§ 289, subd. (k)(1), italics added; see *People v. Harrison* (1989) 48 Cal.3d 321, 329 ["[A] violation of section 289 is 'complete' the instant 'slight' 'penetration' of the proscribed nature occurs."].) Thus, we must compare the evidence supporting a finding of at least slight penetration of K.S.'s anus by foreign object with the evidence supporting a finding of no such penetration.

The testimony of witnesses involved in the assault on K.S. strongly supported a finding that the dildo penetrated K.S.'s anus at least slightly. Flock testified he lubricated a "heavy plastic" dildo (which he described as 12 inches long and "two or three inches around") and handed it to Robles, who then "jab[bed] and "poke[d]" K.S. with it "[i]n his rear end somewhere." K.S. testified both Robles and Flock "tried to force [the dildo] in [his] butt" and while they did so, he felt a "lot of pain," which he rated eight or nine on a

scale of one through 10. When asked if he knew whether the dildo actually penetrated his anus, K.S. testified, "It hurt bad enough where I think it did." K.S. also testified his "tailbone hurt for a long time" and he "couldn't sit down for a month" after the assault.⁸

The medical evidence also strongly supported a finding of penetration. The nurse who examined K.S. after the sexual assault found redness, tenderness and bruising on his anus and blood in his rectum. Photographs of these injuries were introduced at trial. The nurse testified the injuries she observed were consistent with K.S.'s anus having been penetrated by a dildo.⁹

Thus, we conclude the evidence supporting a finding that the dildo penetrated K.S.'s anus, which supported Bewley's conviction of sexual penetration by foreign object,

⁸ Bewley disparages K.S.'s testimony as "equivocal" and "inconclusive." She cites K.S.'s trial testimony he was "still unsure today if *the broomstick* penetrated [his] rectum" (italics added), and he had not *seen* either the dildo or the broomstick penetrate his anus. But, K.S. did not have to *see* the dildo or the broomstick go into his anus to establish penetration; he *knew* the dildo penetrated his anus because he *felt* severe pain when Flock and Robles repeatedly tried to force it into his rectum. (See *People v. Lewis* (2001) 26 Cal.4th 334, 356 [witness has personal knowledge if he can recollect impression derived from his own senses]; *People v. Thomas* (1986) 180 Cal.App.3d 47, 54-56 (*Thomas*) [victim's testimony she felt pain when defendant pushed his penis against her anus supported finding of slight penetration].)

⁹ Bewley argues the corroborative medical evidence was "uncompelling" because the nurse conceded rectal bleeding may also result from hemorrhoids, rectal polyps or other theoretical causes. Unlike penetration of K.S.'s anus by a dildo, however, the other potential causes of rectal bleeding mentioned by the nurse had no basis in the facts of this case. Thus, the existence of those other, purely theoretical causes did not diminish the evidentiary value of the finding of blood in K.S.'s rectum as support for the finding that the dildo penetrated his anus. (See *People v. Jennings* (2010) 50 Cal.4th 616, 643 [merely theoretical contributor to injury is not a legal cause of injury]; *People v. Scola* (1976) 56 Cal.App.3d 723, 727 ["The burden upon the prosecution, however, is not to *disprove* any possible theory of causation raised by the defense."].)

was strong. (See *People v. Ribera* (2005) 133 Cal.App.4th 81, 86 ["little question that penetration occurred" when victim "suffered pain the next day"]; *Thomas, supra*, 180 Cal.App.3d at pp. 54-56 [victim's testimony she felt pain when defendant pushed his penis against her anus supported finding of slight penetration]; *People v. White* (1986) 179 Cal.App.3d 193, 197, 202-203 [evidence of bruising around anus and "intense pain" experienced by victim supported conviction under § 289, subd. (a)]; *People v. Gonzalez* (1983) 141 Cal.App.3d 786, 790 [victim's testimony she felt pain when defendant tried to sodomize her and subsequent rectal pain and bleeding established at least slight penetration].)

In contrast to the evidence supporting a finding that the dildo penetrated K.S.'s anus, the evidence supporting a finding of no such penetration (which arguably might have supported Bewley's conviction of a lesser included offense of sexual penetration by foreign object) was weak. Bewley asserts "Flock provided affirmative evidence of an absence of penetration," and as support cites the following exchange between Flock and his trial counsel:

"Q. And where was [Robles] poking [K.S.]?"

"A. In his rear end somewhere. *I wasn't really right up close watching what she was doing.*

"Q. *Did you see her insert the dildo into his anus eight to ten times?*

"A. *No, sir.*

"Q. Did that happen?"

"A. No sir." (Italics added.)¹⁰

On cross-examination, Flock confirmed he was "so far away" that he did not know whether the dildo actually penetrated K.S.'s anus "even the slightest bit." When fairly read, Flock's testimony shows only that he did not see the dildo penetrate K.S.'s anus *because he was not in a position to do so*; his testimony did not constitute "affirmative evidence" of an absence of penetration that contradicted the evidence supporting penetration. (See *Hughes v. Atchison etc. Ry. Co.* (1932) 121 Cal.App. 271, 274 [when witness was in no position to perceive event, testimony he did not perceive event does not create conflict with positive testimony of those who were in position to perceive event and did so].)

Accordingly, we hold the evidence supporting a finding of penetration of K.S.'s anus by the dildo was "so *relatively* strong," but the evidence supporting a finding of no penetration was "so *comparatively* weak," that it is not reasonably probable the jury would have found Bewley guilty of a lesser offense included in sexual penetration by foreign object had the jury been instructed on such offenses. (*Breverman, supra*, 19 Cal.4th at p. 177; see also *People v. King* (2010) 183 Cal.App.4th 1281, 1319 [any error in failing to instruct on sexual battery as lesser included offense of sexual penetration by foreign object was harmless when evidence against defendant was overwhelming].)

¹⁰ Bewley also cites Flock's affirmative response to his trial counsel's question about the accuracy of Flock's statement to police that "*from what [he] saw* [Robles] couldn't get [the dildo] in because it was too big." (Italics added.)

Hence, error, if any, in failing to instruct on lesser included offenses of count 2 is not reversible. (Cal. Const., art. VI, § 13; *Watson*, *supra*, 46 Cal.2d at p. 836.)

B. *Bewley and Flock Must Be Resentenced*

Bewley and Flock contend, and the People concede, resentencing on their convictions on count 2 (sexual penetration by foreign object) is required because the sentencing court mistakenly believed section 667.6, subdivision (d) mandated imposition of full-term consecutive sentences for those convictions.¹¹ Flock argues, and the People agree, remand is required so that the trial court may impose sentence on Flock's conviction on count 6 (burglary). Bewley also contends section 654 requires a stay of execution of the sentence for her conviction on count 2; and Flock contends the statute requires a stay of execution of the sentences for his convictions on counts 2 and 3.¹² As we shall explain, we agree the matter must be remanded for resentencing of both Bewley and Flock, but leave the resolution of any section 654 issues to the sentencing court on remand.

The parties are correct that section 667.6, subdivision (d) did not require the trial court to sentence Bewley and Flock to consecutive full terms for their convictions on

¹¹ In imposing the consecutive three-year term at Flock's sentencing hearing, the court expressly referred to section 667.6, subdivision (d). At the subsequent sentencing hearing for Bewley, the court imposed the same sentence. Furthermore, both Flock's and Bewley's probation reports (which the sentencing court read) referenced section 667.6, subdivision (d) in stating, erroneously, that a full, separate and consecutive term for imprisonment was required for the convictions on count 2.

¹² The People concede section 654 requires a stay of execution of the punishment imposed for Flock's conviction on count 3 (simple assault).

count 2. Section 667.6, subdivision (d) provides that a "full, separate, and consecutive term *shall* be imposed" for each conviction of an enumerated sex offense "if the crimes involve *separate victims* or involve the *same victim on separate occasions*." (Italics added.) Section 667.6, subdivision (d) "constitutes a mandatory consecutive sentencing scheme *applicable only when a defendant has been convicted of two or more [enumerated sex offenses]*." (*People v. Jones* (1988) 46 Cal.3d 585, 595 (*Jones*), italics added.) Bewley and Flock, however, were each convicted of *only one enumerated sex offense*, sexual penetration by foreign object (see § 667.6, subd. (e)(8)). Hence, they were not subject to mandatory consecutive sentencing under section 667.6, subdivision (d). (*People v. Goodliffe* (2009) 177 Cal.App.4th 723, 727, fn. 10 (*Goodliffe*).

Although section 667.6, subdivision (d) is inapplicable, subdivision (c) of that section may apply. That subdivision states: "In lieu of the term provided by Section 1170.1, a full, separate, and consecutive term *may* be imposed for each [enumerated sex offense] if the crimes involve the *same victim on the same occasion*." (§ 667.6, subd. (c), italics added.) Section 667.6, subdivision (c) gives a sentencing court discretion as to how to punish a defendant for a conviction of an enumerated sex offense *when the defendant is convicted of multiple offenses against the same victim on the same occasion, but only one of the offenses is an enumerated sex offense*. (*People v. Belmontes* (1983) 34 Cal.3d 335, 345-346 (*Belmontes*); *Goodliffe, supra*, 177 Cal.App.4th at p. 732; *People v. Pelayo* (1999) 69 Cal.App.4th 115, 123.) Under these circumstances, "[t]he court may impose a full, consecutive sentence under subdivision (c) for each [enumerated sex

offense] conviction or, instead, it may apply the standard consecutive sentencing formula in section 1170.1." (*Jones, supra*, 46 Cal.3d at p. 593.) The court also has a third option: to impose concurrent sentences. (§ 669; *Belmontes*, at pp. 347-348; *People v. Reeder* (1984) 152 Cal.App.3d 900, 922-923.)

Here, as the parties note, the sentencing court never exercised its discretion in selecting among these three options, because it erroneously believed it had no such discretion. "Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to 'sentencing decisions made in the exercise of the "informed discretion" of the sentencing court,' and a court that is unaware of its discretionary authority cannot exercise its informed discretion." (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) We therefore reverse the sentences imposed on Bewley and Flock for their convictions on count 2 (sexual penetration by foreign object) and remand the matter to allow the sentencing court to exercise its discretion whether to sentence them concurrently or consecutively, and, if consecutively, whether to sentence them under section 667.6, subdivision (c) or under section 1170.1.¹³

¹³ "The ideal method of proceeding would be for the trial court first to decide generally between concurrent and consecutive terms, following the criteria listed in rule [4.]425 [of the California Rules of Court]. Once the court has decided to sentence a defendant to consecutive terms and has stated its reasons therefor, it then must decide whether the consecutive terms should be under the principal/subordinate scheme of section 1170.1 or under the full and separate term scheme of section 667.6, subdivision (c). If the latter is chosen, the reasons therefor should be stated for the

The sentencing court also erred in imposing no sentence on Flock for his conviction of first degree burglary (count 6). When a defendant is convicted on multiple counts, it is the duty of the court to pronounce sentence on each conviction and impose the punishment prescribed by law. (§ 12; *People v. Duff* (2010) 50 Cal.4th 787, 795-796; *People v. Cheffen* (1969) 2 Cal.App.3d 638, 641-642.) "The failure to pronounce sentence on a count is an unauthorized sentence and subject to correction on remand." (*People v. Price* (1986) 184 Cal.App.3d 1405, 1411, fn. 6.) We therefore remand for the imposition of sentence on Flock's conviction on count 6.

We further conclude resentencing of Bewley and Flock on all convictions is appropriate. When the court initially sentenced them, it expressed an intention to sentence both to prison for aggregate terms of 10 years to life. The prison terms to be imposed on remand for Bewley's conviction on count 2 and for Flock's convictions on counts 2 and 6 will affect their aggregate sentences. We therefore reverse Bewley's and Flock's entire sentences and "remand for a full resentencing as to all counts . . . , so the trial court can exercise its sentencing discretion in light of the changed circumstances." (*People v. Navarro* (2007) 40 Cal.4th 668, 681; see also *People v. Hill* (1986) 185 Cal.App.3d 831, 834 [when case is remanded for resentencing, trial court may rethink entire sentence to achieve its original sentencing goal].)

record. This decision, of course, should be made very carefully, for the Legislature obviously intended by the alternative language in section 667.6, subdivision (c) that this more punitive provision be reserved for the more serious sex offenders." (*Belmontes, supra*, 34 Cal.3d at pp. 348-349.)

In connection with the challenges to their sentences, Bewley and Flock also contend execution of certain portions of the sentences must be stayed pursuant to section 654, because the criminal acts underlying some of the offenses of which they were convicted were parts of an indivisible course of conduct that constituted torture.¹⁴ Since we are reversing the sentences and remanding for resentencing, the parties may make their respective arguments regarding the applicability of section 654 to the court upon resentencing.¹⁵ Any decision by us on the section 654 issues at this time would be an advisory opinion, which we have no power to issue. (See, e.g., *People v. Slayton* (2001) 26 Cal.4th 1076, 1084.)

Nevertheless, with no intent to suggest how the trial court should decide any section 654 issues that may arise on remand, but simply for the guidance of the court, we point out that section 667.6, subdivision (c) "permits imposition of consecutive full-term sentences, *notwithstanding the provisions of section 654*, when the defendant is convicted of an offense enumerated in section 667.6[, subdivision (e)], based upon the commission of a separate act that constituted part of an indivisible course of conduct." (*People v.*

¹⁴ Section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

¹⁵ Bewley's appellate counsel has informed us in a supplemental letter brief that Bewley is gravely ill and currently housed in a skilled nursing facility, and he requests that any modification to her sentence not require her relocation to another facility. This argument, like the section 654 arguments, should be addressed to the sentencing court on remand.

Hicks (1993) 6 Cal.4th 784, 792, italics added.) Thus, on remand the court *may* impose full, separate and consecutive terms for Bewley's and Flock's convictions of torture (count 1) and sexual penetration by foreign object (count 2) if the court decides to sentence them under section 667.6, subdivision (c), because that statute "create[s] an exception to section 654 that would allow multiple punishment for separate criminal acts committed during an indivisible course of conduct." (*Hicks*, at p. 793.)

If on remand the court instead chooses to employ section 1170.1 in resentencing Bewley and Flock for their convictions on count 2, then the court must determine whether section 654 requires a stay of execution of any portion of their aggregate sentences. "The initial inquiry in any section 654 application is to ascertain the defendant's objective and intent. If he entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*Beamon, supra*, 8 Cal.3d at p. 639.) If, however, all of the offenses were incident to one intent or objective and constituted an indivisible course of conduct that violated more than one penal statute, the defendant may only be punished for the offense with the longest potential term of imprisonment. (§ 654, subd. (a); *Neal v. State of California* (1960) 55 Cal.2d 11, 19; *People v. Perry* (2007) 154 Cal.App.4th 1521, 1525.) In making its determinations regarding Bewley's and Flock's intents and objectives, the trial court should state on the record the factual basis for its conclusions.

C. *The Trial Court Did Not Err in Denying Huerta's Motion to Withdraw His Guilty Plea*

Huerta contends the trial court erroneously denied his motion to withdraw his guilty plea. He complains his trial counsel did not advise him of his "maximum exposure if he proceeded to trial"; and, had he been so advised, he would not have pled guilty. Huerta also claims the lack of proper advice concerning such "maximum exposure" constituted ineffective assistance of counsel entitling him to withdraw the guilty plea. For reasons we shall explain, we conclude the trial court properly denied Huerta's motion.

As a threshold matter, we reject the People's contention that Huerta forfeited his right to challenge the trial court's denial of his motion to withdraw his guilty plea on the ground he did not understand his "maximum exposure" simply because, at the hearing on the motion, the parties and the trial court focused on other grounds Huerta had urged to withdraw the plea.¹⁶ One of the grounds for relief asserted in Huerta's written motion was that he "did not understand and his counsel did not adequately discuss with him . . . the consequences of his guilty plea." Huerta specifically argued "he did not understand or have explained his maximum exposure" if he were to go to trial and be convicted on

¹⁶ We also reject the People's related contention that Huerta is precluded from arguing the "maximum exposure" issue because he did not list that specific issue in his request for a certificate of probable cause. "Section 1237.5 does not limit the scope of review of the denial of a motion to withdraw a plea of guilty when that error is properly before the court on appeal." (*People v. Ribero* (1971) 4 Cal.3d 55, 62.) "The defendant's statement need not list every potential issue; if the trial court issues the certificate based on even a single nonfrivolous claim, the defendant may raise all of his or her claims on appeal—those that require a certificate as well as those that do not—even if they were not identified in the statement filed with the trial court." (*People v. Johnson* (2009) 47 Cal.4th 668, 676.)

all counts. Thus, by presenting the issue to the trial court as part of his written motion and suffering an adverse ruling on the motion, Huerta preserved the issue for appeal. (See, e.g., *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1113; *DiPirro v. Bondo Corp.* (2007) 153 Cal.App.4th 150, 177-178.)

Turning to the merits of Huerta's challenge, we begin by setting forth the established rules governing our review of an order denying a motion to withdraw a guilty plea. Upon motion by a represented defendant at any time before judgment, a trial court "may . . . for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted." (§ 1018, italics added.) "Mistake, ignorance or any other factor overcoming the exercise of free judgment is good cause for withdrawal of a guilty plea. [Citations.] But good cause must be shown by clear and convincing evidence." (*People v. Cruz* (1974) 12 Cal.3d 562, 566.) "The grant or denial of such a withdrawal motion is 'within the sound discretion of the trial court and must be upheld unless an abuse thereof is clearly demonstrated.' [Citation.] We are required to accept all factual findings of the trial court that are supported by substantial evidence." (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 917 (*Ravaux*).

Applying these settled rules, we find no abuse of discretion by the trial court in denying Huerta's motion. Huerta correctly asserts that before agreeing to plead guilty, a defendant must understand the consequences of the plea, including the permissible range of punishment he may expect upon conviction. (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605; *People v. Aguirre* (2011) 199 Cal.App.4th 525, 528.) As evidence he did not understand the expected punishment, Huerta relies solely on the purportedly

"uncontested" statements to that effect in the declaration he submitted in support of his motion.¹⁷ "However, in determining the facts, the trial court is not bound by uncontradicted statements of the defendant." (*People v. Hunt* (1985) 174 Cal.App.3d 95, 103 (*Hunt*); see also *People v. Fairbank* (1997) 16 Cal.4th 1223, 1252-1255 [trial court may disbelieve testimony of defendant seeking to withdraw guilty plea].)¹⁸ There was other evidence from which the trial court could infer Huerta knew of the potential prison term he was facing if he went to trial and was convicted.

For example, the felony plea form Huerta and his counsel signed — which the trial court reviewed and found "more telling" than Huerta's declaration — identified the prison term Huerta stipulated to (although not the maximum prison term he faced if he went to

¹⁷ In his declaration, Huerta stated: "My [trial counsel] did not discuss my exposure with me. I was not aware that my exposure was 19.8 years to life and that my plea was only reducing my exposure by 5.4 years. I did not feel that I ha[d] adequate time to discuss my exposure with my attorney." Huerta further stated, "If [my trial counsel had] explained my exposure to me and explained that I was only reducing my exposure by 5.4 years I would not have given up my right to a jury trial or my right to confront my accusers." The declaration was unsigned, however, and thus did not constitute evidence of anything. (See *People v. Pierce* (1967) 66 Cal.2d 53, 59; *Stockinger v. Feather River Community College* (2003) 111 Cal.App.4th 1014, 1026.)

¹⁸ Contrary to Huerta's contention, *Padilla v. Kentucky* (2010) ___ U.S. ___ [176 L.Ed.2d 284, 130 S.Ct. 1473] does not require us to accept as true the statements in his declaration. *Padilla* concerned a claim for postconviction relief in which the United States Supreme Court assumed the truth of Padilla's allegations for the purpose of deciding whether the Sixth Amendment obligated counsel to advise him of the potential deportation consequences of conviction. (*Id.* at p. ___ [176 L.Ed.2d at p. 290, 130 S.Ct. at p. 1478].) After answering that legal question in the affirmative, the court remanded the matter for an evidentiary hearing to determine whether Padilla was entitled to postconviction relief. (*Id.* at p. ___ [176 L.Ed.2d at p. 299, 130 S.Ct. at pp. 1486-1487].) *Padilla* thus does not require us to credit the statements in Huerta's declaration in deciding whether he is entitled to relief on this direct appeal.

trial and were convicted on all counts), and also stated Huerta had adequate time to discuss the consequences of his guilty plea with counsel and understood the consequences of the plea. When the trial court accepted the plea, it advised Huerta he was "under no obligation or pressure to enter a plea today" and could proceed to trial if he wished. After going through the charges to which Huerta pled guilty and the prison terms to be imposed on them pursuant to the plea agreement, the court asked Huerta whether he needed more time to speak to his counsel or had any questions for the court, and he responded no. In addition, at the hearing on the motion to withdraw the plea, the court noted that immediately before entering his own guilty plea, Huerta had sat through the proceeding at which Robles pled guilty; and during that proceeding, the court discussed in detail the range of prison terms associated with various offenses, including those with which Huerta was charged.

Viewed in the light most favorable to the judgment, this evidence supports the inferences that Huerta (1) was aware of the potential prison term he faced if he were convicted after trial, (2) had adequate time to discuss sentencing issues with his counsel and (3) understood the prison sentence he would receive by pleading guilty was less than his "maximum exposure" if convicted after trial.¹⁹ These inferences, in turn, support the

¹⁹ We reject Huerta's related argument that he is entitled to have his plea set aside on appeal because his trial counsel was ineffective in failing to advise of the potential prison term Huerta faced if he were convicted on all counts after trial. Huerta did not assert ineffective assistance of counsel as a ground for relief in the trial court; and, aside from the assertion in his unsigned declaration, the record does not establish such ineffective assistance. (See *People v. Barella* (1999) 20 Cal.4th 261, 272 [defendant's bare assertion

trial court's findings that Huerta "did understand what he was doing" and that his "plea was taken in a manner that allowed [him] time to think and consider," and also its ultimate decision to deny Huerta's motion to withdraw the plea. Therefore, we must affirm the order denying the motion. (See *Ravaux, supra*, 142 Cal.App.4th at p. 918 [appellate court must accept trial court's factual findings that are supported by substantial evidence]; *Hunt, supra*, 174 Cal.App.3d at p. 104 [where conflicting inferences may be drawn from evidence, appellate court must adopt inference that supports challenged order].)

In addition to the grounds raised in his initial briefing, Huerta argues, in a supplemental letter brief which we solicited (see fn. 7, *ante*), that his plea should be set aside on two other grounds: (1) the plea agreement violated section 1192.7; and (2) the dismissal of the burglary charge against him deprived the court of jurisdiction to accept a guilty plea on that charge. In their supplemental letter brief, the People contend Huerta has no standing to argue the plea agreement violated section 1192.7, and the agreement validly included a plea of guilty to the dismissed burglary charge. We agree with the People.

Huerta is not entitled to withdraw his guilty plea on the ground the plea agreement violated section 1192.7. That section prohibits plea bargaining in any case charging a serious felony or a violent sex crime unless there is insufficient evidence to prove the People's case, the testimony of a material witness cannot be obtained, or plea bargaining

insufficient to establish ineffective assistance of counsel]; *People v. Black* (2009) 176 Cal.App.4th 145, 153 [same].)

will not substantially change the defendant's sentence. (§ 1192.7, subd. (a)(2), (3).) Here, the prohibitions on plea bargaining potentially applied because the information charged Huerta with both serious felonies and a violent sex crime: torture, robbery and sexual penetration by foreign object. (§§ 1192.7, subd. (c)(8), (19), (25), 667.61, subd. (c)(5).) Nevertheless, Huerta may not raise a violation of section 1192.7, if any, as a ground to avoid his plea agreement because he did not assert that ground in the trial court. (*People v. Gonzales* (1986) 188 Cal.App.3d 586, 590.) And, more importantly, because the prohibitions on plea bargaining under section 1192.7 are "clearly intended to protect the public and not defendants" (*Gonzales*, at p. 590), Huerta "lacks standing to attack his plea bargain on appeal under section 1192.7" (*People v. Webb* (1986) 186 Cal.App.3d 401, 412).

Finally, Huerta's agreement to plead guilty to the burglary charge that had been dismissed does not invalidate his plea. Plea bargaining generally involves the agreement of a defendant to forego trial by pleading guilty in exchange for a less severe punishment than would result if he were convicted of all offenses with which he has been charged. (*People v. Segura* (2008) 44 Cal.4th 921, 929-930.) As part of a plea bargain, a defendant may plead guilty to an offense with which he was not charged and which the prosecution cannot prove, provided the offense is reasonably related to the defendant's conduct. (*People v. Jackson* (1985) 37 Cal.3d 826, 836, overruled on other grounds as stated in *People v. Burton* (1989) 48 Cal.3d 843, 863; *People v. West* (1970) 3 Cal.3d 595, 612-613.) Here, the burglary charge to which Huerta pled guilty was reasonably related to his conduct in preventing K.S.'s escape while Robles and Flock burglarized

K.S.'s house. (See § 31 [aider and abettor is liable as principal].) Also, the punishment Huerta received for the burglary conviction — a consecutive term of 16 months (§§ 461, subd. (a), 1170.1, subd. (a)) — was less than the punishment he might have received had he been convicted of the charge of sexual penetration by foreign object that was dismissed as part of the plea bargain — a consecutive term of eight years (§§ 289, subd. (a)(1), 667.6, subd. (c)). Accordingly, the trial court had jurisdiction to accept his plea of guilty to the previously dismissed burglary charge as part of the plea bargain. (See *West*, at p. 613.)

D. *The Judgment Against Huerta Must Be Modified*

Huerta contends the judgment against him must be modified in two ways: (1) to state his obligation to pay \$616.34 in victim restitution is joint and several; and (2) to correct the amount of the fine he must pay under section 1202.5. The People concede the second point, but contend there is no need to modify the restitution order because Huerta did not object to it and because liability is joint and several as a matter of law. We will order appropriate modifications to the judgment.

As to victim restitution, the record indicates the sentencing court intended to impose joint and several liability on defendants. The court ordered Huerta to pay the exact same amount (\$616.34) it ordered Robles, Bewley and Flock to pay. This was the amount K.S. claimed for relocation expenses and medical bills. As the People concede, when multiple defendants cause a victim's losses, they may be held jointly and severally liable to make restitution. (§ 1202.4, subd. (f); *People v. Madrana* (1997) 55 Cal.App.4th 1044, 1049-1052.) As the People also concede, we may modify a judgment imposing a

victim restitution obligation to state expressly the obligation is joint and several. (*People v. Neely* (2009) 176 Cal.App.4th 787, 800.) We do so here "out of an excess of caution." (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1535.)

As to the section 1202.5 fine, the sentencing court ordered Huerta "to pay a total fine of \$10 per qualifying charge," but did not set a total dollar amount for the fine. The court minutes and abstract of judgment list \$40 as the amount of the fine; the minutes further state the \$40 consists of "\$10 per qualifying charge" pursuant to section 1202.5. Because Huerta was convicted of robbery (§ 211) and burglary (§ 459), he is subject to a \$10 fine. (§ 1202.5, subd. (a).) This fine, however, can be imposed only once in any case, regardless of the number of qualifying offenses of which the defendant is convicted in the case. (*People v. Crittle* (2007) 154 Cal.App.4th 368, 371.) The amount of Huerta's section 1202.5 fine, therefore, must be reduced to \$10.

DISPOSITION

The convictions against Bewley and Flock are affirmed. The sentences against Bewley and Flock are reversed, and the matter is remanded for resentencing on all convictions in accordance with the views expressed in this opinion.

The judgment against Huerta is modified to state expressly his obligation under section 1202.4, subdivision (f) to pay \$616.34 in victim restitution is joint and several, and to reduce the amount of the section 1202.5 fine from \$40 to \$10. In all other respects, the judgment against Huerta is affirmed. The trial court is directed to prepare an amended abstract of judgment to reflect these modifications to the judgment against

Huerta, and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

IRION, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.