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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RAMON FLUGENCIO GONZALEZ,

Defendant and Appellant.

D059713

(Super. Ct. No. SCD228173)

APPEAL from a judgment of the Superior Court of San Diego County,  
Roger W. Krauel, Judge. Judgment affirmed as modified.

Raymond M. DiGuiseppe, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney  
General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor and Meredith S.  
White, Deputy Attorneys General, for Plaintiff and Respondent.

## I.

### INTRODUCTION

Defendant Ramon Flugencio Gonzalez committed sexual offenses against a victim who was intoxicated and unconscious. A jury convicted Gonzalez of one count of oral copulation of an unconscious person (§ 288a, subd. (f); count 1) and one count of oral copulation of an intoxicated person (§ 288a, subd. (i); count 2), based on a single act of oral copulation; one count of assault with intent to commit sexual penetration (§ 220, subd. (a); count 3), and two counts of sexual battery (§ 243.4, subd. (e)(1); counts 4 and 5).

Gonzalez appealed from the judgment of conviction, arguing (1) that the trial court abused its discretion in allowing Juror No. 6 to remain on the jury after the juror indicated that, based on a photograph contained in one of the prosecution's exhibits, he believed that the victim was the grandmother of a friend of his, and that he would not be able to remain impartial; (2) that his convictions on counts 1 and 2 for unlawful oral copulation cannot both stand, because he committed only one act of unlawful copulation that constituted a single violation of Penal Code<sup>1</sup> section 288a; and (3) that his sentences for two counts of sexual battery should be stayed pursuant to section 654 because they were part of the same course of conduct for which Gonzalez was already punished as a result of his conviction for assault with the intent to penetrate.

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

This court issued an opinion in which we rejected Gonzalez's argument regarding Juror No. 6, but concluded that Gonzalez's convictions on counts 1 and 2 could not both stand, and that Gonzalez's sentence for one of the sexual battery counts should have been stayed pursuant to section 654. (*People v. Gonzalez* (2012) 211 Cal.App.4th 405, review granted Feb. 27, 2013, S207830.)

The Supreme Court granted the People's petition for review solely with respect to the question whether Gonzalez may stand convicted of both counts 1 and 2. The Court reversed our judgment with respect to that issue, alone, and remanded the matter to this court for further proceedings consistent with its opinion. (*People v. Gonzalez* (2014) 60 Cal.4th 533 (*Gonzalez*).)<sup>2</sup> We now conclude, upon remand from the Supreme Court, that the judgment in this case should be modified to reflect that Gonzalez's sentence on count 5 be stayed pursuant to section 654, and that the judgment be affirmed as so modified.

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<sup>2</sup> The Supreme Court's opinion in *Gonzalez, supra*, 60 Cal.4th 533, became final on November 20, 2014. California Rules of Court, rule 8.200(b)(1) provides that "[w]ithin 15 days after finality of a Supreme Court decision remanding or order transferring a cause to a Court of Appeal for further proceedings, any party may serve and file a supplemental opening brief in the Court of Appeal." In this case, neither party filed a supplemental opening brief in this court after the Supreme Court's decision. Further, for reasons that are not clear to this court, there was a significant delay in the transfer of the case back to this court, and we received the record and remittitur in July 2016. Upon receipt of the record and the Supreme Court's remittitur, this court is issuing its opinion as promptly as possible. The lengthy delay in the time between the finality of the Supreme Court's decision and this court's action on that decision is unfortunate. However, it appears that Gonzalez has not suffered prejudice as a result of the delay, given that the relief to which he is entitled is a stay of execution of a sentence that he was ordered to serve concurrently with the sentence on another count, and which he was deemed to have completed at the time of sentencing. Thus, the actual number of days Gonzalez was to serve pursuant to judgment in the case has not been affected by the appellate proceedings, or by the delay on remand to this court from the Supreme Court.

## II.

### FACTUAL AND PROCEDURAL BACKGROUND<sup>3</sup>

"In the early evening of June 25, 2010, defendant Ramon Fulgencio Gonzalez and the victim, Carolyn H., were on the sidewalk near the intersection of 16th Street and Island Avenue in San Diego. Carolyn, who had passed out after having drunk a pint of vodka, lay with her head near defendant's lap. Witnesses saw defendant moving Carolyn's head up and down with one hand while his penis was in her mouth. A police officer arrived on the scene and confronted defendant, who put his penis back in his pants and tried to zip them. When the officer pulled defendant away from Carolyn, who was unconscious, her head hit the concrete. The officer handcuffed defendant, and paramedics transported Carolyn to a hospital." (*Gonzalez, supra*, 60 Cal.4th at p. 536.)

On January 6, 2011, a jury convicted Gonzalez of one count of oral copulation of an unconscious person (§ 288a, subd. (f); count 1); one count of oral copulation of an intoxicated person (§ 288a, subd. (i); count 2); one count of assault with intent to commit sexual penetration (§ 220, subd. (a); count 3), and two counts of sexual battery (§ 243.4, subd. (e)(1); counts 4 and 5).

The trial court sentenced Gonzalez to the low term of three years on count 1, and imposed but stayed the low term sentence of three years on count 2, pursuant to section 654. On count 3, the court imposed the low term of two years, to run concurrently with

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<sup>3</sup> We take our factual background for this opinion from the Supreme Court's opinion in this matter. (See *Gonzalez, supra*, 60 Cal.4th at p. 536.)

the sentence on count 1. The court sentenced Gonzalez to 180 days, with credit for time served, on counts 4 and 5.<sup>4</sup>

### III.

#### DISCUSSION

A. *The trial court did not abuse its discretion in allowing Juror No. 6 to remain on the jury*

Gonzalez contends that the trial court should have excused Juror No. 6 on the ground that the juror was biased. According to Gonzalez, Juror No. 6 developed a bias against the defense based on one of the photographs of the victim, and the trial court's limited inquiry into the matter did not dispel the likelihood that the juror carried this bias into the jury's deliberations. As we concluded in our previous opinion, we find no merit in Gonzalez's contention that the trial court erred in failing to excuse Juror No. 6 on the ground that the juror was biased.

1. *Additional background*

At the close of the People's case, but before the defense called a witness, Juror No. 6 informed the court, "I don't think I can stay fair and unbiased. I recently came to the realization that People's exhibit B seemed vaguely familiar to me, and during the recess, I just placed where I had seen it." The court asked the juror to remain where he was and listen to the testimony of the defense's first witness. The court indicated that it would discuss the matter with the juror later.

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<sup>4</sup> Thus, by the time sentence was pronounced, Gonzalez had already fully served his sentence with respect to counts 4 and 5. Counts 4 and 5 are not reflected on the felony abstract of judgment in this case.

After excusing the other jurors for the day, the court asked Juror No. 6 to stay behind to discuss the matter that the juror had raised earlier in the day. Juror No. 6 explained that he believed that he had recognized one of People's exhibits, which was a photograph of the victim. He thought that he had seen the photograph posted by a good friend on a Facebook page with a caption that read in part, "Nana." He assumed that the woman in the photograph was his friend's grandmother. The court asked Juror No. 6, "Is that an image and an association and information that you cannot set aside and rely just on the evidence that's presented here?" Juror No. 6 responded, "I was thinking about it all during the recess, even though I probably shouldn't have been, I don't think I could." The court conferred with the attorneys off the record at this point. After this discussion, the prosecutor asked to speak with the court outside the presence of the juror. Juror No. 6 left the courtroom and the attorneys and the court spoke about the matter. The prosecutor told the court that the victim had a son who lived in San Diego, but the son was in prison, and, more importantly, the photographs in question had never been released to the public. The court called Juror No. 6 back into the courtroom and asked whether the juror recognized the actual photograph, or, rather, whether he believed he recognized the person in the photograph. The juror indicated that he believed he had seen one of the actual photographs that the prosecutor had used as an exhibit. When the trial court indicated to the juror that none of the photographs had been released, the juror said that the photograph he had seen seemed to show the same person in the same position, but with her granddaughter and grandson "like around her and on the bed." The court explained that the grandchildren of the person in the photograph "would not [have] be[en]

able to do that," and said that it was unlikely that the person shown in the photograph in the prosecution's exhibit was the same person as the person in the photograph that the juror had seen. The juror responded, "Okay. That makes everything different."

Defense counsel asked Juror No. 6 for the name of his friend, which Juror No. 6 provided. The court then said, "We'll make a check over this evening; and if we've miscalled this one, we'll recall it tomorrow and we'll address it again. But, right now, you can go home thinking that it's a different person." Juror No. 6 responded, "Okay." There was no further discussion of the matter.

## 2. *Analysis*

The constitutional right to a fair trial requires that the jury decide the case solely on the basis of evidence from witnesses. (*People v. Nesler* (1997) 16 Cal.4th 561, 578.) " 'Before an appellate court will find error in failing to excuse a seated juror, the juror's inability to perform a juror's functions must be shown by the record to be a "demonstrable reality." The court will not presume bias, and will uphold the trial court's exercise of discretion on whether a seated juror should be discharged for good cause under section 1089 if supported by substantial evidence.' " (*People v. Jablonski* (2006) 37 Cal.4th 774, 807, quoting *People v. Holt* (1997) 15 Cal.4th 619, 659.) The decision whether to investigate the possibility of juror bias and the extent of any investigation rests within the sound discretion of the trial court. (*People v. Cleveland* (2001) 25 Cal.4th 466, 478.)

Contrary to Gonzalez's contention, the trial court's inquiry was sufficient. The trial court dispelled any potential bias that Juror No. 6 may have harbored based on his assumption that he recognized the victim. The trial court inquired as to Juror No. 6's

concern, and obtained sufficient information from that juror to be able to inform the juror that he was mistaken in his belief that the victim was the grandmother of one of his friends. Gonzalez makes much of the fact that Juror No. 6's friend could have been Carolyn's granddaughter after all, since there was nothing further on the record about this issue. However, as the matter was left, the court indicated that the court and the prosecutor would pursue the matter further and that if there had been some mistake about whether Juror No. 6's friend was related to the victim in this case, the court would revisit the issue. Given that this issue was not discussed again, we may reasonably infer both that Juror No. 6 was mistaken in his belief that he knew a relative of the victim, and also that Juror No. 6 understood that he had been mistaken in his belief that he knew a relative of the victim. We may further infer that any potential bias that Juror No. 6 may have harbored was dispelled once Juror No. 6 was disabused of the notion that his friend was related to the victim. Under these circumstances, the trial court did not abuse its discretion in the manner in which it handled the investigation into Juror No. 6's potential bias, or in allowing Juror No. 6 to remain on the panel.

*B. Appellant may stand convicted on both counts 1 and 2*

Gonzalez was convicted of both oral copulation of an unconscious person under section 288a, subdivision (f) (count 1), and oral copulation of an intoxicated person under section 288a, subdivision (i) (count 2). After analyzing the statute at issue, and distinguishing the decision in *People v. Craig* (1941) 17 Cal.2d 453, the Supreme Court stated:

"We conclude that . . . the two statutory subdivisions at issue here[, i.e., section 288a, subdivision (f) and section 288a, subdivision (i),] describe different offenses, and defendant may properly be convicted of, although not punished for, both." (*Gonzalez, supra*, 60 Cal.4th at p. 535.)

Based on this conclusion, it is clear that Gonzalez may stand convicted on both counts 1 and 2. The trial court's judgment reflects his convictions on both counts. In addition, the trial court stayed imposition of sentence on count 2 pursuant to section 654, such that Gonzalez was not punished for both offenses. We therefore affirm the trial court's judgment with respect to counts 1 and 2.

*C. Imposition of punishment on count 5 must be stayed pursuant to section 654*

Gonzalez contends that his sentences with respect to the sexual batteries of which he was convicted in counts 4 and 5 should have been stayed pursuant to section 654. As we concluded in our previous opinion, it is clear that Gonzalez's sentence on count 5, only, should have been stayed pursuant to section 654 because his commission of this sexual battery was incidental to his commission of the assault with intent to commit penetration alleged in count 3.

Section 654 provides in relevant part: "(a) 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. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other." Section 654 prohibits multiple punishments where a single criminal act or omission violates more than one penal statute. This statutory prohibition has been extended to

cases in which the defendant engages in an indivisible course of conduct with a single objective, but violates several different penal statutes in the process. (See *Neal v. State of California* (1960) 55 Cal.2d 11, 19, disapproved on another ground in *People v. Correa* (2012) 54 Cal.4th 331, 338.) "If all of the crimes were merely incidental to, or were the means of accomplishing or facilitating one objective, a defendant may be punished only once. [Citation.] If, however, a defendant had several independent criminal objectives, he may be punished for each crime committed in pursuit of each objective, even though the crimes shared common acts or were parts of an otherwise indivisible course of conduct." (*People v. Perry* (2007) 154 Cal.App.4th 1521, 1525.)

In reviewing a defendant's claim that the court erred in failing to stay a sentence pursuant to section 654, the "defendant's intent and objective present factual questions for the trial court, and its findings will be upheld if supported by substantial evidence." (*People v. Andra* (2007) 156 Cal.App.4th 638, 640.)

The People assert that the evidence presented at trial indicated that "at certain points, appellant had his hand down Carolyn's pants 'manipulating' her genitalia, and, at other points, his hand was on her buttocks, which w[ere] exposed as a result of appellant pulling down her pants." According to the People, based on the testimony, "the trial court could reasonabl[y] conclude that appellant had his hand on her buttocks at certain points, and inside her pants at other points" and that the "sexual battery counts (counts 4 and 5) were based on appellant's conduct of touching Carolyn's exposed buttocks." The People assert that "this is precisely what the prosecutor argued in her closing statements"

and contend that the "sexual battery was not necessary to accomplish the assault, and the assault was not necessary to accomplish the sexual battery."

It is clear from both the closing statements and the instructions to the jury that the conduct underlying the charge in count 5 is in fact the same conduct that forms the basis for the charge in count 3. Count 3 charges an assault with the intent to commit penetration, and the People do not dispute that this charge was based on Gonzalez's fondling of Carolyn's genitalia. Contrary to the People's contention that both of the sexual battery counts could have been based on Gonzalez's conduct in touching Carolyn's buttocks (and apart from the issue whether the evidence would support two separate charges based on the touching of her buttocks), the jury was clearly informed that the two sexual battery counts were based on two different acts, specifically, that one was based on Gonzalez's fondling of Carolyn's genitalia, and the other was based on Gonzalez's touching Carolyn's buttocks. The information alleged as to count 4 that Gonzalez committed the crime of sexual battery when he "touched Victim's buttocks," and alleged as to count 5 that he "touched Victim's genital area." In addition, the jury was instructed with respect to the specific intent element of count 4 that it must find that Gonzalez "touched Caroline [*sic*] H.'s *buttocks area*: [¶] For the specific purpose of sexual arousal, sexual gratification, or sexual abuse." (Italics added.) With respect to the specific intent element of count 5, the jury was instructed that it must find that Gonzalez "touched Caroline [*sic*] H.'s *genital area*: [¶] For the specific purpose of sexual arousal, sexual gratification, or sexual abuse." (Italics added.) It is thus clear that the sexual battery alleged in count 5 and the offense alleged in count 3, assault with intent to commit

penetration, were based on the same act—Gonzalez's fondling of Carolyn's genitalia. Because the offenses in counts 3 and 5 are based on the same act, Gonzalez may not be punished twice for that act. The trial court should have stayed imposition of the sentence on count 5 pursuant to section 654.

#### IV.

#### DISPOSITION

The judgment of conviction is modified to reflect that the sentence on count 5 is stayed pursuant to section 654. In all other respects, the judgment is affirmed.

AARON, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.