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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN PABLO RAMOS,

Defendant and Appellant.

E052150

(Super.Ct.No. INF064627)

OPINION

APPEAL from the Superior Court of Riverside County. Richard A. Erwood, Judge. Affirmed in part, reversed in part with directions.

David L. Polsky, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Peter Quon, Jr., and Susan Miller, Deputy Attorneys General, for Plaintiff and Appellant.

Following a jury trial, defendant Juan Pablo Ramos was convicted of two counts of assault with intent to commit forcible rape during a residential burglary (Pen. Code,<sup>1</sup> § 220, subd. (b)), counts 1 and 9; two counts of sexual penetration by force (§ 289, subd. (a)(1)), counts 2 and 6; two counts of first degree burglary (§§ 459, 460, subd. (a)), counts 3 and 12; assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)), count 4; forcible rape (§ 261, subd. (a)(2)), count 10; and forcible oral copulation (§ 288a, subd. (c)(2)), count 11. The jury found true the allegation that defendant committed the two counts of sexual penetration by force while committing a first degree burglary (§ 667.61, subds. (d)(4)), attached to counts 2 and 10, and that he committed a sex offense against more than one victim (§ 667.61, subd. (e)(5)). On October 22, 2010, defendant was sentenced to state prison for an indeterminate term of 40 years to life and a determinate term of 10 years four months.

Defendant appeals, contending his convictions for residential burglary must be reversed and the charges dismissed on the grounds that these offenses are lesser included offenses of assault with intent to commit forcible rape during the commission of a first degree burglary. He also challenges his sentence.

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

## I. FACTS

### *A. Crimes against Jane Doe 2 (Counts 9 through 12, Inclusive)*

On the morning of October 17, 2007, Jane Doe 2 was living with her boyfriend, Michael Dahlstrom, in Cathedral City. She woke up feeling ill. After getting her something to eat, Dahlstrom left for work and Doe 2 went back to bed.

Around 9:30 a.m., Doe 2 heard her bedroom door open and saw a blurry figure in the doorway. She inquired who was there, and defendant responded. When Doe 2 realized it was a stranger, she tried to run away, but defendant grabbed her and pushed her down on the bed. He covered her mouth and told her to be quiet, and that “he’s wanted this.” He proceeded to orally copulate her and then “very forcefully” raped her.

At approximately 10:00 a.m., the police were in a vehicle pursuit of defendant about two miles from Doe 2’s house. After crashing his car, defendant took off on foot. Eventually he was apprehended.

Doe 2 was taken to the hospital for a sexual assault examination. Body secretions, including seminal fluid, were collected from her inner thighs, left breast and bottom lip. Defendant stipulated that DNA tests showed the seminal fluid was from him. At the hospital, Doe 2 noticed \$300 was missing from her wallet, which had been on the kitchen counter when defendant entered her house and raped her.

### *B. Crimes against Jane Doe 1 [Counts 1 through 8, inclusive]*

At about 1:00 a.m. on January 23, 2009, Jane Doe 1 awakened to someone ringing the doorbell of her Cathedral City home. When she answered it, no one was there. After it happened a second time, she called 911. The police responded to her call but were

unable to find anyone. After they left, Doe 1 saw a man walk across her lawn and she called 911 again. The police returned but were unable to locate anyone.

After the police left, Doe 1 locked her door. She let her 13-year-old son sleep in her bed with her and had a can of pepper spray under her pillow. She also programmed 911 into her cell phone and put it on her chest. Shortly thereafter, defendant smashed the glass of her sliding glass door and forced his way into her bedroom. She dialed 911 when she heard the crash. As defendant attacked Doe 1, ripping off her nightgown and underwear, she pushed the “on” button on her cell phone. The 911 operator heard the attack. Defendant was hitting Doe 1 in the face. As she began to black out, she yelled to her son to get out of the house, causing defendant to momentarily get off her. When defendant resumed his attack, Doe 1 sprayed him in the face with the pepper spray, causing him to leave. After defendant left her house, Doe 1 called 911 again.

The police found defendant’s blood on the gate in front of Doe 1’s house. They also found a “sex toy or a dildo” on the floor in Doe 1’s bedroom that did not belong to her.

The next day, defendant was spotted going up to the front door of another Cathedral City home. The officer apprehended him. In a planter about eight feet away from the front door, the officer found a “dildo or a sex toy.” In an interview, defendant admitted breaking Doe 1’s sliding glass door to get inside the house. He also admitted bringing the sex toy with him. He admitted putting his hand inside Doe 1’s vagina and leaving the sex toy in her bedroom when he fled. In a second interview, he denied the assault on Doe 2.

### *A. The Defense*

Defendant testified he had met Doe 2 at a CVS store in October 2007. After talking, they agreed to meet a week later at a park. When they met, Doe 2 complained about her boyfriend, told defendant she liked him, and said she wanted to meet again. According to defendant, the two met again. They kissed, Doe 2 asked him to leave his girlfriend, and she asked him to come to her house on October 17 when her boyfriend would be at work. On October 17, the two engaged in consensual oral copulation and sexual intercourse. After defendant told Doe 2 that he would not leave his girlfriend, he left. As he was driving home, a police officer tried to stop him. He got nervous because he was driving without a license.

Defendant stated that he began robbing houses for money in 2009. He often stole things, including sex toys. On the night of January 22, 2009, he was at a party and was drinking. Worried about money, he decided to go steal. He brought a sex toy with him to dispose of it. When he came across Doe 1's house, it looked like no one was home. On two separate occasions he rang the doorbell and no one answered. He waited awhile and then used a rock to break the sliding glass door.

Inside, defendant saw Doe 1 holding a phone and screaming. He attacked her to get the phone so she would not call the police. As they were struggling, Doe 1's son left the room and defendant decided he should leave. As he tried to get up, Doe 1 said, "Not my son" and pulled him down. As he was falling on top of her, his hand landed between her thighs. According to defendant, he might have accidentally brushed her vagina with his hand as he attempted to get up. She was wearing underwear and defendant denied

putting his hand or fingers inside her vagina. Also, he claimed that when he pushed off of her to leave, he accidentally ripped the strap on her nightgown. He admitted hitting her because she kept hitting him and would not let go. During the struggle, the sex toy fell out of his pocket; he had had no intention of using it that night.

When he was apprehended by the police, he had the sex toy in his possession in an attempt to dispose of it.

## II. IS RESIDENTIAL BURGLARY NECESSARILY INCLUDED IN THE SEXUAL ASSAULTS?

Defendant contends, and the People concede, that defendant's convictions of first degree burglary with respect to each victim must be reversed because they are lesser included offenses of his convictions of assault with intent to commit forcible rape during the commission of a first degree burglary. (Compare § 220, subd. (b), with § 459 and § 460, subd. (a); *People v. Reed* (2006) 38 Cal.4th 1224, 1226-1227 [multiple convictions based on necessarily included offenses prohibited]; *People v. Ortega* (1998) 19 Cal.4th 686, 698 [statutory definitions of both offenses and the language of the accusatory pleading determines whether an offense is necessarily included]; *People v. Medina* (2007) 41 Cal.4th 685, 701-702 [dismissal of lesser included offense required when the defendant is convicted of both the greater and the lesser offenses].) Accordingly, defendant's conviction for first degree burglary as alleged in counts 3 and 12 are reversed, with directions to the trial court to dismiss those charges.

### III. REMAND FOR RESENTENCING

Defendant raises four sentencing issues, most of which may be disposed of by remanding this case for resentencing. At the sentencing hearing, the trial court stated the following:

“Count 1 of the Information, that’s a violation of [section] 220, punishment for that is life in prison. Because of the sentence I’m going to impose on Count 2, that punishment will be stayed pursuant to [section] 654.

“With respect to Count 2, that’s the violation of [section] 289, subdivision (a), the defendant is sentenced to 25 years to life. The reason for that sentence is the special allegation [(namely section 667.61) ]attached to that count that was found by the jury to be true.

“With respect to Count 3, it’s a violation of [section] 459 . . . first-degree burglary. I’m going to select the mid term of four years; however, because that is included in the special allegations that attached to Count 2, punishment on that count will be stayed pursuant to [section] 654.

“With respect to Count 4, [section ] 245 . . . defendant is sentenced to three years in state prison. I am imposing that sentence consecutive to the sentence that I’ll be imposing in Count 10, and so I have to take one-third of the mid term by law, so that will be one year consecutive.

“With respect to Count 6, that’s a [section] 289, subdivision (a) crime, that had the special allegation [(namely section 667.61) ]attached. I’ll sentence the defendant to 25 to

life; however, since that is the same crime and same special allegation that's imposed in Count 2, that sentence has to be stayed as a matter of law pursuant to [section] 654.

“With respect to Count 9, violation of [section] 220 . . . the defendant will be sentenced to life in prison.

“With respect to Count 10, a violation of [section] 261, subdivision (a), subsection (2), I'm going to sentence the defendant to eight years in prison. That sentence I've selected the . . . aggravated term. The victim was particularly vulnerable; she was ill and in her bed, she was not wearing her contact lenses, so she couldn't recognize that it was a stranger in her bedroom until it was too late and he was close enough to attack her.

“The crime indicates planning and sophistication, waiting until the victim's boyfriend left for work.

“The defendant has engaged in violent conduct. He's a serious danger to the community. These factors outweigh his youthfulness and lack of serious prior record.

“I would point out the STATIC 99 report is the worse report this Court has ever seen.

“With respect to Count 11, [section] 288, subdivision (a) . . . the Court will impose the mid term of six years, and that will run concurrent with the sentence imposed in Count 10.

“With respect to Count 12, violation of [section] 459, first-degree burglary, the Court will impose four years in state prison. I'm going to run that sentence consecutive. Since I'm running it consecutive, by law I have to take one-third of the mid term; that will be one year, four months.

“With regard to the special allegation under . . . [section] 667.61, subdivision (c), that allegation has as a penalty 15 years to life.

“So with respect to the determinate terms, it will be . . . ten years, four months. And with respect to the indeterminate term, it will be 40 years to life.”

The court later added: “I do agree with defense counsel’s argument as far as the sentence on Count 6 that I’ve . . . imposed and stayed pursuant to [section] 654. I don’t believe that there was enough of a break in the action to allow me to impose consecutive sentences on that count.

“I think my tentative sentence that [counsel] argued against, the aggravated term on Count 10, I think the aggravated term is appropriate in this case.

“It’s my intent by imposing this sentence that I’ve previously articulated that, Mr. Ramos, that you never get out of prison. You’re a danger to the community. You’re a danger to women especially. You stalked these women, you planned out their attack, and then you attacked them.

“Jane Doe Number 1 did everything right: She called the police, the police came out, then you hid. Then you were back in her yard again, and she called the police the second time, they came out, and you hid. And then you still decided to go through with the attack by throwing a rock through the slider.

“It’s clear that you’re just an extreme danger to the community, and I don’t think there’s any hope for you ever to be rehabilitated. And it’s my hope that you spend the rest of your life in prison, based upon the sentence that I’ve given you.”

A. *Counts 9 and 10 and Section 654*

For the forcible rape of Doe 2 (count 10), the trial court sentenced defendant to the aggravated term of eight years. For his conviction of assault with intent to commit rape of Doe 2 during the commission of a burglary (count 9), he was sentenced to an indeterminate term of life in prison. Although the abstract of judgment and the minute order reflect the sentences were to be served consecutively, the trial court failed to specifically indicate at the sentencing hearing whether the two should be served consecutively or concurrently. Thus, on appeal, defendant contends his sentence on count 9 should have been stayed pursuant to section 654 because it was “the means by which he committed the rape” of Doe 2 as charged in count 10, and “was thus incidental to the rape.”

Section 654 prohibits multiple punishment when the same “act or omission” or an indivisible course of conduct violates two or more criminal statutes. (§ 654; *People v. Deloza* (1998) 18 Cal.4th 585, 591.) If two or more offenses are committed pursuant to a single intent and objective, the defendant can be punished for only one of the offenses. (*People v. Britt* (2004) 32 Cal.4th 944, 951-952 (*Britt*.) When section 654 applies, punishment for one offense must be imposed, and punishment for the other offense or offenses must be imposed and stayed, and cannot be imposed concurrently or consecutively. (*People v. Deloza, supra*, at p. 592.) This serves the purpose of section 654, which is to ensure that the defendant’s punishment is “commensurate with his culpability.” (*People v. Harrison* (1989) 48 Cal.3d 321, 335 (*Harrison*.)

The application of section 654 thus “turns on the *defendant’s* objective in violating” multiple statutory provisions. (*Britt, supra*, 32 Cal.4th at p. 952.) Where the commission of one offense is merely “a means toward the objective of the commission of the other,” section 654 prohibits separate punishments for the two offenses. (*Britt, supra*, at p. 953.) On appeal, we apply a substantial evidence standard of review. (*People v. Wynn* (2010) 184 Cal.App.4th 1210, 1215.) “[T]he law gives the trial court broad latitude in making this determination.” (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.) Although the defendant’s intent or objective is primarily a factual issue, the application of section 654 to undisputed facts is a question of law, which we determine de novo. (*Harrison, supra*, 48 Cal.3d at p. 335.) Where a trial court fails to reference section 654, in general, we deem the sentence to reflect the court’s implicit determination that each crime had a separate objective. (*People v. Osband* (1996) 13 Cal.4th 622, 730-731

Here, the trial court was aware of section 654 and specifically found that as to the crimes committed against Doe 1, it did not believe there was enough of a break in the action to impose a consecutive sentence on count 6, and thus, imposed and stayed it pursuant to section 654. Despite its acknowledgement of section 654 in reference to the crimes involving Doe 1, the court failed to reference section 654 regarding counts 9 and 10 involving Doe 2. We therefore deem the court’s silence to reflect an implicit determination that counts 9 and 10 had a separate objective. As the People point out, the evidence shows that at the point where defendant pushed Doe 2 down onto the bed and got on top of her, he completed the assault. He was then presented with a chance to

reflect on his conduct and stop any further attack. He chose not to do so, and instead committed acts of oral copulation and rape. Thus, the trial court correctly imposed separate punishment for the assault with intent to commit rape during the course of a burglary.

*B. Counts 9 and 10 and Section 669*

Alternatively, defendant argues that if we conclude that section 654 does not apply to counts 9 and 10, then the sentence for his conviction of assault with intent to commit rape of Doe 2 during the commission of a burglary (count 9) must be deemed to run concurrently pursuant to section 669.

Pursuant to section 669, whenever a person is convicted of two or more crimes, the trial court must direct whether the terms of the imprisonment for the offenses are to run consecutively or concurrently. Furthermore, when the court fails to make such direction, the terms are deemed to run concurrently. (§ 669 [“Upon the failure of the court to determine how the terms of imprisonment . . . shall run, the term of imprisonment on the . . . subsequent judgment shall run concurrently.”].)

*C. Determinate and Indeterminate Terms and Section 669*

At sentencing, the trial court stated that the determinate term would be 10 years four months, and the indeterminate term would be 40 years to life. However, the court failed to indicate whether defendant was to serve the indeterminate sentence consecutively or concurrently to the determinate sentence. Thus, defendant contends that, because the trial court failed to determine how the indeterminate and determinate terms of imprisonment shall be served, this court should correct the abstract of judgment

and minute order to reflect the terms are to be served concurrently. The People disagree. They argue that given the trial court's comments, it can be reasonably inferred that it intended the determinate and indeterminate sentences to be served consecutively so that defendant would "spend the rest of [his] life in prison."

The court is not relieved of its affirmative duty to determine whether sentences for multiple crimes should be served concurrently or consecutively (*In re Calhoun* (1976) 17 Cal.3d 75, 82), nor does it create a presumption or entitlement to concurrent sentencing. (*People v. Caudillo* (1980) 101 Cal.App.3d 122, 125.) Under section 669, a defendant convicted of multiple offenses is entitled to the exercise of the sentencing court's discretion. Accordingly, the trial court must state reasons for its sentencing choices, including the choice of imposing consecutive sentences. (Cal. Rules of Court, rule 4.406(b)(5); *People v. Walker* (1978) 83 Cal.App.3d 619, 622.) "[A] requirement of articulated reasons to support a given decision serves a number of interests: it is frequently essential to meaningful review; it acts as an inherent guard against careless decisions, insuring that the judge himself analyzes the problem and recognizes the grounds for his decision; and it aids in preserving public confidence in the decision-making process by helping to persuade the parties and the public that the decision-making is careful, reasoned and equitable. [Citation.]" (*People v. Martin* (1986) 42 Cal.3d 437, 449-450.)

Here, the comments made by the trial court strongly support the People's argument. Furthermore, the abstract of judgment reflects that the sentence on count 9 is "to run Consecutive to Count 2." Given the clear desire of the trial court that defendant

would “spend the rest of [his] life in prison,” we could reasonably infer that the court intended the determinate and indeterminate terms to run consecutively. However, since the matter must be remanded for resentencing, we will allow the trial court to state its sentencing choice and reasons.

*D. Determinate Terms in Counts 10 and 11, and Indeterminate Term under the One Strike Law*

Finally, defendant contends and the People concede that the trial court erred by imposing determinate terms on the rape conviction (count 10) and the oral copulation conviction (count 11). They both agree the court should have imposed indeterminate terms of 15 years to life for each count pursuant to section 667.61. (§ 667.61; *People v. DeSimone* (1998) 62 Cal.App.4th 693, 699.) They part ways on whether the two terms should be served concurrently or consecutively.

Defendant argues the terms on counts 10 and 11 should be served concurrently, while the People contend that, “as this case must be remanded to the trial court for the reasons discussed in the previous arguments, the trial court should also be allowed at that time to determine whether the sentences should be run concurrently or consecutively to each other.” In his reply brief, defendant points out that the court expressly ordered count 11 to run concurrently with count 10. However, the choice to impose these terms concurrently was based on the trial court’s erroneous imposition of determinate terms on these counts. It is unclear how the trial court would have exercised its discretion had it not erred. Thus, remand for resentencing is necessary.

*E. Analysis*

In each of the above identified issues, the trial court failed to articulate reasons for its sentencing choices. Based on this record, remand for resentencing is required. Specifically, the trial court should determine whether to run the sentences on counts 9 and 10 concurrently or consecutively. The same decision is needed as to whether the determinate and indeterminate sentences should be concurrent or consecutive, as well as the terms for counts 10 and 11.

IV. DISPOSITION

Defendant's convictions for first degree burglary as alleged in counts 3 and 12 are reversed, with directions to the trial court to dismiss those charges. The order sentencing defendant is reversed, and the cause is remanded for resentencing in order for the trial court to exercise its discretion and state its reasons for its sentencing choices. The trial court is further ordered to prepare and forward to the appropriate agencies an amended abstract of judgment reflecting the noted modifications to defendant's convictions and sentence. In all other respects, the judgment is affirmed.

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HOLLENHORST

Acting P. J.

We concur:

KING

J.

CODRINGTON

J.