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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.

JOSE SALVADOR DELGADO,

Defendant and Appellant.

E054385

(Super.Ct.No. SWF025842)

OPINION

APPEAL from the Superior Court of Riverside County. Elisabeth Sichel, Judge.

Affirmed with directions.

Marilee Marshall, 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, and Lilia E. Garcia and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

In a previous appeal in *People v. Jose Salvadore Delgado* (Jan. 20, 2011, E049128 [nonpub.opn.]) (Case No. E049128),¹ this court reversed defendant Jose Salvador Delgado's conviction for burglary and remanded for resentencing. Following resentencing, defendant again appeals, contending that (1) his court security fee should be \$20 per count instead of \$30 per count; (2) fees and assessments imposed as to the burglary count should be stricken; and (3) his sentence of 19 years to life was cruel and unusual punishment.

The People properly concede error with respect to the fees and assessments, and we have identified other errors in the abstract of judgment that require correction. We affirm the judgment in all other respects.

II. FACTS AND PROCEDURAL BACKGROUND

The statement of facts is taken from our opinion in case No. E049128.

"A. Prosecution Evidence

"Defendant and Jane Doe (the victim) married in March 2007 and had a son together. In June 2008, they were living with defendant's mother and stepfather in Lake Elsinore. The victim moved out with the couple's son in mid-June 2008 and filed for divorce. However, the victim attended family events with defendant after she moved out. In one conversation, the victim told defendant she might consider moving back in with him.

¹ Per our order of January 10, 2012, we take judicial notice of case No. E049128.

“On June 23, 2008, defendant telephoned the victim at the dentist’s office where she worked and told her he would meet her for lunch. The victim said she had to work and would talk to him later. Defendant nonetheless showed up with his little brother, J., just before the victim began her 1:00 p.m. lunch break. The victim refused to go with defendant, and he became frustrated, grabbed her, and pulled her into his truck.

“Defendant drove directly to his mother’s house. During the drive, defendant argued with the victim, slapped her, and pushed her face to the side. Defendant parked his truck in the driveway and told J. to go inside. Defendant then told the victim to get out of the truck. She did not want to get out and ‘just froze there for a little bit.’ Defendant reached into the truck, put one arm around the victim’s neck, and used his other hand to squeeze her private area and then her breast ‘really hard.’ He then picked her up and carried her into the house. The victim did not see J. inside the house; he had gone into his room and shut the door.

“Defendant placed the victim in the kitchen. She started to walk toward the living room, but defendant pushed her into his mother’s bedroom. Defendant tried to kiss her while she struggled. Defendant removed her pants and pinned her on the floor against a wall. The victim tried pushing him off, but he penetrated the victim’s vagina with his penis and thrust five or six times until he ejaculated. He used her torn shirt to wipe himself off.

“Defendant then propped the victim on the bed and told her she didn’t deserve to live. After about 10 minutes, defendant pushed the victim down, and pushed her legs

open. He picked up a baby clothes hanger and attempted to penetrate her vagina with it while she tried to push him away. Defendant told the victim everything was her fault because she had cheated on him, and she deserved to be in hell where her father was. Defendant tried to penetrate her vagina with a hairbrush while she continued to try to fight him off. She kept telling defendant they needed to talk things out and he should take her back to work.

“Defendant went to the kitchen and returned holding a knife. He told the victim it would be her fault if he committed suicide. He put the knife on the victim and then held it to his own neck while he grabbed the victim’s hand and forced her to grip the knife. Defendant alternated between putting the knife on his own neck and the victim’s neck. He jabbed the knife into his neck, making a mark and causing bleeding. Defendant told the victim he was not afraid of her calling the police on him—he dialed 911 but then hung up.

“Defendant went to the garage and returned with another shirt for the victim to wear. She got dressed, and defendant drove her back to work. He was crying on the drive and apologized for what he had done.

“At her workplace, the victim broke down crying and told a coworker what had happened. The coworker saw that the victim was wearing different clothes and had bruises on her arm. The coworker called the police.

“Deputy Sheriff Brian Burgess went to the victim’s workplace and interviewed her; a recording of the interview was played for the jury. The victim was transported to

the hospital, rape kit evidence was taken, and the victim's bruises were photographed. A nurse observed scrapes and bruises in various parts of the victim's body, and the victim had an area of tenderness on her vaginal wall.

"Deputy Sheriff Daniel Householder went to defendant's house; defendant was not home, so the deputy parked and waited. The defendant drove up a few minutes later, and the deputy asked to speak to him. Defendant looked nervous and ran through a neighbor's open garage into the neighbor's house. Defendant told the neighbor the police were chasing him and he needed a place to hide. The neighbor did not allow defendant to stay. Defendant was later found in a nearby trailer park hiding under a mattress in an empty trailer. He again tried to run away but was taken into custody.

"Defendant was interviewed at the sheriff's station. He asked the detective what he was being charged with and how long he would get. The detective told defendant he was being charged with spousal rape and kidnapping, and that it was not up to the detective to decide the sentence.

"The victim testified that she had visited J. at his school in October 2008. She did not talk to him about the case and did not attempt to influence how he testified.

"B. Defense Evidence

"Pauline Jimenez, a friend of the victim, testified that the victim had told her the victim was going to put defendant in jail because she would rather see him in jail than out on the street with another woman. The victim made similar statements to a coworker and

to two of defendant's nieces. She also told the coworker that if she caught defendant talking to another woman, she would 'chop his balls.'

"Defendant's sister testified that the victim told her defendant was angry with one of the victim's male friends and wanted to 'kick his ass.' In the afternoon of June 23, 2008, defendant called his sister and told her he was 'running from the cops' because he had threatened the victim's boyfriend, and the victim had told him she was going to 'put the cops on him.'

"Defendant's mother testified that in the early morning hours of June 23, 2008, she heard knocking at the door and heard defendant get up. She looked out and saw the victim's car in the driveway, and she heard defendant and the victim in the garage making love.

"J. testified that the victim had called their house on June 23, 2008, after which defendant drove to her work and picked her up. When they got back to the house, J. got out and went to his room, and defendant and the victim went to the mother's bedroom. J. could hear them talking but could not hear what they said. They were in the room for 10 or 15 minutes, and then defendant told J. he was taking the victim back to work.

"J. also testified that the victim visited him at his school and told him to lie in court and say he had not been there when defendant picked her up from her work.

"C. Rebuttal

"When J. was interviewed on June 23, 2008, he told the deputy he could hear defendant and the victim arguing in the mother's bedroom. J. heard defendant accuse the

victim of cheating on him. He told the deputy he had not seen defendant and the victim leave the house.

“D. Verdict and Sentence

“The jury found defendant guilty of aggravated kidnapping for the purpose of committing spousal rape ([Penal Code,²] § 209, subd. (b)(1); count 1); spousal rape (§ 262, subd. (a)(1); count 2); burglary (§ 459; count 3); attempted rape with a foreign object (§§ 664, 289, subd. (a)(1); count 5) and sexual battery (§ 243.4, subd. (a); count 7). The jury also found true the special allegations under section 667.61, subdivisions (e)(1) and (e)(2) as to count 2, and the special allegation under section 667.5, subdivision (c) as to count 3. The trial court sentenced defendant to 25 years to life for count 2, imposed a consecutive three-year middle term for count 5, and a consecutive one-year term (one-third the middle term) for count 7. Finally, the trial court imposed a six-year term for count 3 and a term of life for count 1, but stayed those terms under section 654.”

In the previous appeal, this court reversed defendant’s burglary conviction and remanded for resentencing. On remand, the trial court sentenced defendant to 15 years to life for count 2, a consecutive term of three years for count 5, and a consecutive term of one year for count 7. The court imposed a term of seven years to life for count 1 but stayed that term under section 654.

² All further statutory references are to the Penal Code unless otherwise noted.

III. DISCUSSION

A. Court Security Fee

Defendant contends his court security fee under section 1465.8 should be \$20 per count instead of \$30 per count. The People concede the fee should be reduced. We agree with the People's concession of error. Defendant was convicted of five counts on July 6, 2009. The trial court imposed a court security fee of \$30 for each count under section 1465.8, subdivision (a)(1). After this court reversed defendant's conviction on the burglary count, the trial court assessed "the same fines and fees previously assessed," and the abstract of judgment reflects a total court security fee of \$150. The court security fee in effect at the time of defendant's conviction was \$20 per count. (Former § 1465.8, subd. (a), amended by Stats. 2009-2010, 4th Ex. Sess., ch. 22, § 29, eff. July 28, 2009.) In *People v. Alford* (2007) 42 Cal.4th 749, 754, the court held that the Legislature intended courts to impose the court security fee required at the time of a defendant's conviction. We will therefore order the abstract of judgment to be amended accordingly.

B. Fees and Assessments Relating to Burglary Count

Defendant contends fees and assessments imposed as to the burglary count should be stricken.

Among the "same fines and fees previously assessed" were a criminal conviction fee of \$30 under Government Code section 70373 and a criminal assessment fee of \$30 under Penal Code section 1465.8 as to the burglary count. The People properly concede that because this court reversed that count, the fees and assessments relating to that count

should also have been reversed. We will order the abstract of judgment to be amended accordingly.

C. Challenge to Punishment

Defendant contends his sentence of 19 years to life was cruel and unusual punishment.

Both the state and federal Constitutions ban cruel and unusual punishment. (Cal. Const., art. 1, § 17; U.S. Const., 8th Amend.) “A punishment is excessive under the Eighth Amendment if it involves the ‘unnecessary and wanton infliction of pain’ or if it is ‘grossly out of proportion to the seriousness of the crime.’ [Citation.] A punishment may violate article I, section 17 of the California Constitution if ‘it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.’ [Citation.]” (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 199.) The defendant bears the burden of establishing that his sentence was unconstitutional. (*People v. King* (1993) 16 Cal.App.4th 567, 572.)

The court considers three factors in determining whether a defendant’s punishment violates the state Constitution. (*In re Lynch* (1972) 8 Cal.3d 410, 424-429; *People v. Dillon* (1983) 34 Cal.3d 441, 478-480.) First, the court examines the “nature of the offense and/or the offender, with particular regard to the degree of danger both present to society.” (*In re Lynch, supra*, at p. 425.) Second, the court compares the challenged punishment with punishments for more serious crimes in the same jurisdiction. (*Id.* at pp.

426-427.) Third, the court compares the challenged punishment with punishments for the same offense in other jurisdictions. (*Id.* at pp. 427-429.)

With respect to the first factor, defendant was youthful (20 years old) at the time of the crimes, he had no prior criminal record, and he has expressed remorse. However, defendant committed his crimes over a span of at least half an hour, during which he had several opportunities to stop his behavior, but he failed to do so. As recounted above, he first grabbed the victim at her place of work and pulled her into his truck. He drove her to his mother's house against her will and slapped and pushed her during the drive. When she refused to comply with his order to get out of the truck, he put one arm around her neck and squeezed her private areas and breast, then carried her into the house. He pushed her into his mother's bedroom and tried to kiss her while she struggled. Inside the bedroom, he removed her pants and forcibly raped her. Her ordeal was not yet over—he then told her she did not deserve to live, and he penetrated her vagina with his finger and then attempted to penetrate her with a clothes hanger and a hairbrush while she struggled. He repeatedly put a knife both to the victim and to his own neck before he finally allowed the victim to get dressed again.³

With respect to the second factor, defendant points out his sentence of 19 years to life was “greater than that imposed in this state for second degree murder,” and his crime

³ Defendant argues other purportedly mitigating circumstances relating to himself and his offense, but he fails to cite to the record for any supporting evidence, and we therefore do not consider those circumstances. (See *Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 743.)

was “much less heinous than murder.” In *People v. Crooks* (1997) 55 Cal.App.4th 797, 807, the court responded to a similar argument as follows: “The penalties for single offenses . . . cannot properly be compared to those for multiple offenses—especially where, as here, one offense was committed in order to commit another.” Here, defendant was convicted of four separate crimes, including spousal rape and kidnapping for the purpose of committing spousal rape.

Moreover, “fixing the range of punishment for crime rests on policy determinations that the legislative branch is specially empowered to make.” (*People v. Wutzke* (2002) 28 Cal.4th 923, 942.) The one strike law, section 667.61, “ensures serious sexual offenders receive long prison sentences whether or not they have any prior convictions.” (*Wutzke, supra*, at p. 929.) As one court has explained, “Section 667.61 mandates indeterminate sentences of 15 or 25 years to life where the nature or method of the sex offense ‘place[d] the victim in a position of *elevated vulnerability*.’ [Citation.]” (*People v. Palmore* (2000) 79 Cal.App.4th 1290, 1296.)

Section 667.61 (e)(1) provides for a sentence of 15 years to life for a defendant convicted of spousal rape with an aggravating circumstance, here, kidnapping to commit spousal rape. Because the Legislature has determined the appropriate penalty for the offense, “‘defendant must overcome a “considerable burden” in convincing us his sentence was disproportionate to his level of culpability.’ [Citation.]” (*People v. Crooks, supra*, 55 Cal.App.4th at p. 807 [holding that a sentence of 25 years to life under the one strike law was not cruel and unusual punishment for raping the victim during a burglary

with intent to commit rape]; see also *People v. Alvarado*, *supra*, 87 Cal.App.4th at pp. 199-200 [holding that a sentence of 15 years to life for rape during the commission of a burglary was not cruel or unusual punishment].) Here of course, we reversed defendant’s burglary conviction, but his crimes still come within the one strike statute by virtue of the fact that he kidnapped his victim, and in doing so, placed her in a position of elevated vulnerability.

Defendant does not address the third factor—punishments for similar offenses in other jurisdictions.

Considering the three factors set forth above, we conclude defendant has failed to establish that his sentence was unconstitutionally disproportionate to his crimes under either the state or the federal standard.

D. Other Corrections to Abstract of Judgment

On our own motion, we have identified additional errors in the abstract of judgment that require correction.

First, the abstract of judgment reflects that defendant was convicted in count 3 of burglary and that punishment for the offense was stayed under section 654. This court reversed defendant’s conviction of burglary, and the offense should be removed from the abstract of judgment.

Second, the abstract of judgment states that defendant was convicted in count 1 of “kidnap to commit robbery.” (Capitalization omitted.) Defendant was convicted of

kidnapping to commit spousal rape, and the abstract of judgment should be amended accordingly.

Third, the abstract of judgment states that defendant was convicted in count 2 of “rape of spouse w/bodily injury.” (Capitalization omitted.) Defendant was convicted of spousal rape, and the abstract of judgment should be amended to delete the reference to bodily injury.

IV. DISPOSITION

The trial court is directed to prepare an amended abstract of judgment reflecting a court security fee in the total amount of \$80 and a criminal conviction assessment fee in the total amount of \$120. The reference to a burglary conviction should be deleted; the description of the kidnapping offense should be amended to state “kidnap to commit spousal rape”; and the description of the spousal rape offense should be amended to delete the reference to bodily injury. The amended abstract shall be forwarded to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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HOLLENHORST

J.

We concur:

RAMIREZ

P.J.

MCKINSTER

J.