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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.

RONALD DOUGLAS MCGOWAN, JR.,

Defendant and Appellant.

E054756

(Super.Ct.No. SWF028686)

OPINION

APPEAL from the Superior Court of Riverside County. Albert J. Wojcik, Judge.

Affirmed as modified.

Richard de la Sota, 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 Melissa Mandel and Laura A. Glennon, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Ronald Douglas McGowan, Jr., appeals from his conviction of rape of Jane Doe 1 (Pen. Code,¹ § 261, subd. (a)(2), count 1); robbery (§ 211, count 2); assault of Doe 1 (§ 245, subd. (a)(1), count 3); battery of Doe 1 with serious bodily injury (§ 243, subd. (d), count 4); spousal rape of Jane Doe 2 (§ 262, subd. (a)(1), counts 5 through 8); forcible sodomy of Doe 2 (§ 286, subd. (c)(2), count 9); rape of Jane Doe 3 (§ 261, subd. (a)(2), count 10); rape of Jane Doe 4 (§ 261, subd. (a)(2), count 11); and assault of Doe 4 (§ 245, subd. (a)(1), count 12), along with true findings on enhancement allegations (§§ 667.61, subd. (e)(5) & (6), 12022.7, subd. (a), 667, subds. (a), (c), & (e)(2)(A), and 1170.12, subd. (c)(2)(A)).

Defendant contends: (1) the trial court exceeded its jurisdiction by failing to stay the sentence for count 12 under section 654; (2) three prior serious felony convictions alleged under section 667, subdivision (a) were not brought and tried separately, and the trial court erred in imposing five-year enhancement terms for each of those convictions; and (3) the trial court erred in imposing \$10,000 in restitution under section 1202.4, subdivision (f)(3)(F) and a \$10,000 fine under section 288, subdivision (e). The People concede error in imposing separate five-year enhancement terms under section 667, subdivision (a)(1) as to each unstayed count because the underlying charges were not brought and tried separately. The People also agree that the restitution fine must be

¹ All further statutory references are to the Penal Code unless otherwise indicated.

stricken. We conclude the restitution order must also be corrected. We find no other errors.

II. FACTS AND PROCEDURAL BACKGROUND

A. Prosecution Evidence

With the exception of counts 11 and 12, the facts of defendant's crimes are irrelevant to any issue raised on appeal and will therefore be set forth summarily.

1. Counts 1 through 10

In June 2009, Doe 1 was working as a prostitute from her apartment in Murrieta. Defendant came to her apartment and raped her. During the rape, he forced his tongue into her mouth, and she bit off a chunk of his tongue. After the rape, police officers took Doe 1 to the hospital, and while she was there, defendant came in seeking attention for his tongue. Doe 1 identified him as the rapist.

Doe 2 had been in a relationship with defendant since September 2001; they were married in October 2003 and had two children together. Beginning in 2005, defendant began forcing Doe 2 to have sexual intercourse with him, and he forcibly sodomized her twice. She finally ended the relationship in January 2009. She did not report him to the police because she did not think anyone would believe her.

Doe 3 met defendant in July 2007, and they dated for about six months until she confronted him about her belief that he had taken money from her purse. In late 2008 or early 2009, defendant forced himself into her home, ripped her clothes off, and raped her. She did not try to fight him because he was so much bigger. She did not call the police immediately because she thought it would be her word against his.

2. Counts 11 and 12

In April 2009, Doe 4 was working as an escort who was paid to have sex. She found her clients by running an ad on the internet. Defendant telephoned her and she told him the location of her hotel room. Defendant came to the room and Doe 4 let him in. Defendant searched the room, including the bathroom and closet. He and Doe 4 made small talk, and she asked him for money. In response, he requested condoms. Doe 4 reached into a drawer of the nightstand, and defendant grabbed her and slammed her face down on the bed. Defendant placed her arm behind her back and put his arm around her neck and strangled her. She tried unsuccessfully to scream, and she lost consciousness three times while he strangled her. When she tried to speak, he responded, ““Shut the fuck up, bitch.”” She believed defendant was trying to kill her.

Doe 4 was fully clothed while defendant was strangling her, and he did not try to remove her clothing. He made comments like, ““You should have never opened the door in Sacramento that time,”” and other comments referring to getting revenge or payback for something that had occurred previously. Doe 4 had formerly lived in Sacramento, but she had never seen defendant before.

While she was still lying face down, defendant ordered her to lift her butt up. Defendant had injured Doe 4’s back when he slammed her onto the bed, and she was unable to comply. Defendant stopped strangling her, grabbed her by the leg, flipped her over, and began raping her. She did not try to fight him off because she did not want him to become angry again, and she was finally able to breathe. Defendant no longer appeared angry, and he began kissing her face and neck. She asked him to use a condom,

and he responded, ““If you give me anything [apparently referring to a sexually transmitted disease] . . . I’ll come find you in Sacramento and kill you.’” He stopped raping her to put the condom on. He then resumed raping her until he ejaculated. He got up, zipped his pants, put the condom in his pocket, and yelled at her to get in the shower.

Defendant started looking through the room in drawers and under the mattress, asking, ““Where’s the cheddar?”” by which Doe 4 believed he was asking for money. She told him she had no money, and he continued to tell her to get in the shower. She complied, but kept looking out to see if he was gone. After he left, she used the hotel room telephone to call her family for help because defendant had taken her cell phones. The next day, she went to the hospital because her back still hurt. She told the hospital staff what had happened, and they called the police. Officers came to the hospital, but Doe 4 declined to provide any information because she did not have defendant’s phone number and did not know his name. Sometime later, she saw defendant on the news and reported that he was the man who had raped her.

3. Other Crimes Evidence

Jane Doe 5 started dating defendant in 2000, and she became pregnant. On one occasion, he choked her. After their child was born, defendant raped her three times and once struck her in the face. Doe 5 reported the rapes, which resulted in the revocation of defendant’s parole.

The prosecutor introduced documentary evidence that defendant had been convicted in 1995 of forcible rape, forcible oral copulation, and sexual penetration by a foreign object.

B. Defense Evidence

Defendant testified in his own defense. He testified that Doe 5 had filed a complaint against him after he had a child with Doe 2, and he said he wanted to be with his daughters instead of with Doe 5. His sexual relationship with Doe 3 was consensual. He had sex with both Doe 4 and Doe 1 but did not pay them the full amounts he had agreed to, and they accused him of shortchanging them. Doe 1 bit his tongue when he told her he was not going to pay her the full amount, and she would not let go until he slapped her. All the sex he had with Does 1 through 4 was consensual.

C. Verdicts and Sentence

The jury found defendant guilty of rape of Doe 1 (Pen. Code,² § 261, subd. (a)(2), count 1); robbery (§ 211, count 2); assault of Doe 1 (§ 245, subd. (a)(1), count 3); battery of Doe 1 with serious bodily injury (§ 243, subd. (d), count 4); spousal rape of Doe 2 (§ 262, subd. (a)(1), counts 5 through 8); forcible sodomy of Doe 2 (§ 286, subd. (c)(2), count 9); rape of Doe 3 (§ 261, subd. (a)(2), count 10); rape of Doe 4 (§ 261, subd. (a)(2), count 11); and assault of Doe 4 (§ 245, subd. (a)(1); count 12). The jury also found true as to count 1 that defendant had tied and bound the victim (§ 667.61, subd. (e)(6)³); as to count 3 that he had inflicted great bodily injury (§ 12022.7, subd. (a)); and as to count 1 and counts 5 through 11 that he had committed rape by force against more than one

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

³ This subdivision has been renumbered to subdivision (e)(5). (Stats. 2010, ch. 219, § 16.)

victim (§ 667.61, subd. (e)(5)⁴). In bifurcated proceedings, the jury found true the allegations that defendant had suffered prior convictions as strikes and as serious and violent felonies. (§§ 667, subds. (a), (c), (e)(2)(A) and 1170.12, subd. (c)(2)(A).)

The trial court sentenced defendant to an aggregate term of 168 years plus 440 years to life.

III. DISCUSSION

A. Section 654

Defendant contends the trial court exceeded its jurisdiction by failing to stay the sentence for count 12 under section 654.

1. Additional Background

The probation report recommended a stay of sentence on count 12 under section 654. The trial court rejected that recommendation, explaining, “Count 12 . . . would be two, three, or four [years]; however, based upon the strike priors, that will be a term of 25 years to life. It does appear to the Court that Counts 12 and [11],^[5] same victim; however, these were separate, distinct, different acts that were committed.

2. Analysis

Section 654 prohibits “multiple punishment for a single act or omission, even though that act or omission violates more than one statute and thus constitutes more than

⁴ This subdivision has been renumbered to subdivision (e)(4). (Stats. 2010, ch. 219, § 16.)

⁵ The reporter’s transcript indicates the court actually stated count 6; however, it appears this was a misstatement or reporting error, because Doe 2 was the victim of count 6 and Doe 4 was the victim of counts 11 and 12.

one crime.” (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.) Whether section 654 applies to a particular set of offenses is a question of fact for the trial court, and we uphold the trial court’s findings, whether express or implied, if substantial evidence supports them. (*People v. Tarris* (2009) 180 Cal.App.4th 612, 626 [Fourth Dist. Div. Two].)

The crime of rape, of which defendant was convicted in count 11, is defined as an act of sexual intercourse with a person who is not the spouse of the accused when the intercourse is “accomplished against a person’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person [of the victim].” (§ 261, subd. (a)(2).) Defendant contends there was “no evidence that [he] assaulted Doe 4 in any other way or for any reason other than to complete the crime of rape.” We disagree. The evidence supports the trial court’s finding that defendant had separate objectives in strangling Doe 4 and in raping her. First, his comments to Doe 4 while he was strangling her indicated his objective was revenge for some supposed incident that had happened in Sacramento. Second, the strangling continued for some length of time, causing Doe 4 to pass out three times, and he appeared angry while he was strangling her. Third, he did not remove any portion of Doe 4’s clothing until he flipped her over before raping her. Fourth, the evidence indicated his objective in raping Doe 4 was sexual gratification: Although he had appeared angry during the assault, his demeanor changed, and he became affectionate and kissed her face and neck while he was raping her. When a defendant had multiple independent objectives, each independent violation is

punishable separately, even if there were common acts or the acts were part of an otherwise indivisible course of conduct. (*People v. Beamon* (1973) 8 Cal.3d 625, 639.)

Defendant further contends the assault “supplied the only evidence of the element of force necessary for the proof of the commission of the crime of rape.” Again, we disagree. “As used in the statute, ‘force’ is defined in accordance with common usage. In a forcible rape prosecution, the kind of force necessary need *not* be substantially different [from] or greater than the physical force normally inherent in an act of consensual sexual intercourse: ‘To the contrary, it has long been recognized that “in order to establish force within the meaning of section 261, [former⁶] subdivision (2), the prosecution need only show the defendant used physical force of a degree sufficient to support a finding that the act of sexual intercourse was against the will of the [victim].” [Citation.]’” (*People v. Mejia* (2007) 155 Cal.App.4th 86, 99-100, quoting *People v. Griffin* (2004) 33 Cal.4th 1015, 1023-1024 (*Griffin*).)

In *Griffin*, the court held that evidence the defendant pinned the victim’s arms to the floor while he penetrated her with his penis, and that she did not consent, was sufficient evidence that the rape was accomplished against her will. (*Griffin, supra*, 33 Cal.4th at p. 1029; see also *In re John Z.* (2003) 29 Cal.4th 756, 763 [grabbing the victim’s waist, pulling her down, and rolling her over was sufficient force to support a rape conviction].) Here, after defendant stopped strangling Doe, he flipped her over,

⁶ Section 261 was amended to add sexual penetration by “duress” or “menace” as means by which rape could be accomplished against the victim’s will. (Stats. 1990, ch. 630, § 1, p. 3096.)

straddled her, and pulled off her boot. She was unable to get up “[b]ecause he was still on top of [her].” She tried to comply “so that he wouldn’t get angry again.” He continued to straddle her when he took off the condom and put it in his pocket. That series of events, independent of the choking, provided sufficient force to establish the element of force for the crime of rape.

Courts have held that section 654 “cannot, and should not, be stretched to cover gratuitous violence or other criminal acts far beyond those reasonably necessary to accomplish the original offense.” (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 272.) “[A]t some point the means to achieve an objective may become so extreme they can no longer be termed “incidental” and must be considered to express a different and more sinister goal than mere successful commission of the original crime” (*Id.* at p. 272.) Here, defendant’s choking Doe 4 into unconsciousness constituted gratuitous violence far beyond that necessary to accomplish the crime of rape. Separate punishment was entirely appropriate.

B. Prior Felony Convictions

Defendant was convicted in Sonoma County case No. SCR22244 of three serious felonies (§ 1192.7, subd. (c)(3), (4) & (25)): rape (§ 261, subd. (a)(2)), penetration by a foreign object (§ 289, subd. (a)), and forcible oral copulation (§ 288a, subd. (c)). The jury in the present case found three prior conviction allegations true (§ 667, subdivision (a)). As relevant to defendant’s contention on appeal, the trial court imposed a five-year term under section 667, subdivision (a) for each of defendant’s three serious prior

felonies as to each of the 11 unstayed counts⁷ of which defendant was convicted, for a total of 165 years.

Defendant now contends the three prior felony convictions were not brought and tried separately, and the trial court erred in imposing a five-year term for each of those convictions.

1. Analysis

Section 667, subdivision (a) adds a five-year term to the sentence for a serious felony if the defendant has suffered a prior conviction for the commission of a serious felony. When the defendant has suffered prior strike convictions, the five-year term for each prior serious felony is added to each count for which the defendant is convicted. (*People v. Williams* (2004) 34 Cal.4th 397, 403-404.) However, the five-year enhancement applies only “for each such prior conviction on charges brought and tried separately.” (§ 667, subd. (a)(1).)

The People properly concede that the record does not contain any evidence that the three prior convictions resulted from “charges brought and tried separately” (§ 667, subd. (a)(1)), and the trial court therefore erred in imposing a term of five years for each of those prior convictions as to each unstayed term. We will correct defendant’s sentence to reflect a total determinate sentence of 58 years, comprising a single five-year enhancement term under section 667, subdivision (a) as to each of the 11 unstayed

⁷ The trial court stayed sentence on count 4 under section 654.

counts, plus a three-year enhancement under section 12022.7, subdivision (a) as to count 3.

C. Restitution Order and Fine

Defendant contends the trial court erred in imposing \$10,000 in restitution under section 1202.4, subdivision (f)(3)(F) and a \$10,000 fine under section 288, subdivision (e).

1. Additional Background

At sentencing, the trial court made the following orders concerning victim restitution and restitution fines:

“Pay restitution in the amount of \$10,000, restitution fine in that amount pursuant to [section] 1202.4 of the Penal Code;

“Pay victim restitution in an amount to be determined by probation. Disputes, if any, will be resolved at a formal court hearing. . . .;

“Pay restitution to the extent that the victims have received assistance from California Victim Compensation Government Claim Board in an amount to be determined. If there is a disputed amount, that will be resolved at a formal hearing. . . .

“Pay additional parole revocation restitution fine in the amount of \$10,000 pursuant to [section] 1202.45 of the Penal Code. That fine is suspended;

[¶] . . . [¶]

“Pay \$10,000 pursuant to Penal Code section 288(e);

“\$10,000 pursuant to [section] 1202.4(f)(3)(F).”

2. *Analysis*

(a) Victim restitution

Under the California Constitution, “all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer.” (Cal. Const., art. I, § 28, subd. (b)(13)(A).) Penal Code section 1202.4, subdivision (f) provides: “Except as provided in subdivisions (q) and (r), in every case in which a victim has suffered economic loss as a result of the defendant’s conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court.”

Here, the trial court imposed \$10,000 in restitution under section 1202.4, subdivision (f)(3)(F), which authorizes a trial court to order restitution for “[n]oneconomic losses, including, but not limited to, psychological harm, for felony violations of Section 288.” However, defendant was not convicted of any violation of section 288, and subdivision (f)(3)(F) is therefore inapplicable. Moreover, none of the victims claimed any particular loss or submitted a “Victim Impact/Statement of Loss” letter as requested by the probation department. The People concede the trial court erred in imposing restitution under section 1202.4, subdivision (f)(3)(F), but argue the matter should be remanded for a determination of the proper amount of restitution.

Section 1202.46 provides that “[W]hen the economic losses of a victim cannot be ascertained at the time of sentencing pursuant to subdivision (f) of Section 1202.4, the court shall retain jurisdiction over a person subject to a restitution order for purposes of

imposing or modifying restitution until such time as the losses may be determined. Nothing in this section shall be construed as prohibiting a victim, the district attorney, or a court on its own motion from requesting correction, at any time, of a sentence when the sentence is invalid due to the omission of a restitution order or fine without a finding of compelling and extraordinary reasons pursuant to Section 1202.4.” (See also *People v. Bufford* (2007) 146 Cal.App.4th 966, 969-970.)

Here, the trial court did order “victim restitution in an amount to be determined by probation. Disputes, if any, will be resolved at a formal court hearing.” The trial court was authorized to refer the amount of restitution to the probation department. (See *People v. Bernal* (2002) 101 Cal.App.4th 155, 164.) Thus, no remand for a further court hearing is required. However, the trial court erred in ordering a specific amount of restitution without identifying to whom it should be paid and the basis for the amount of restitution ordered. We will therefore vacate that portion of the trial court’s restitution order without prejudice to a future restitution order in compliance with sections 1202.4, subdivision (f), and 1202.46.

(b) Restitution fine

The trial court imposed a fine of \$10,000 under section 288, subdivision (e). That statute authorizes a fine “[u]pon the conviction of any person for a violation of subdivision (a) or (b) [of section 288].” Defendant was not convicted of a violation of section 288, subdivision (a) or (b), and the fine was therefore unauthorized. The People properly concede the fine must be stricken.

IV. DISPOSITION

The \$10,000 restitution fine under section 288 subdivision (e) is stricken. The order imposing \$10,000 in restitution under section 1202.4, subdivision (f)(3)(F) is stricken, without prejudice to a future restitution order in compliance with sections 1202.4, subdivision (f) and 1202.46. Two 5-year enhancements under section 667, subdivision (a) are ordered stricken as to counts 1 through 3 and 5 through 12. An amended abstract of judgment shall be prepared and forwarded to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

Acting P. J.

We concur:

RICHLI

J.

KING

J.