

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN JOSE PRERA,

Defendant and Appellant.

E055004

(Super.Ct.No. FSB1102202)

OPINION

APPEAL from the Superior Court of San Bernardino County. Annemarie G. Pace, Judge. Affirmed.

Sharon M. Jones, 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, A. Natasha Cortina and Heather M. Clark, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Juan Jose Prera is serving a determinate term of 25 years to life after a jury convicted him of three counts of forcible rape and one count of sexual battery. In

this appeal, defendant argues: 1) the evidence supports only one count of forcible rape because he merely re-inserted his penis two or three times after it became dislodged rather than committing three separate rapes; and 2) even if he was properly convicted of three separate counts of forcible rape, the trial court abused its discretion when it imposed a full, consecutive sentence for each count. As discussed below, the law is quite clear that each penetration constitutes a separate count of rape and the trial court acted well within its discretion when it imposed a full, consecutive sentence for each of the three forcible rape convictions.

FACTS AND PROCEDURE

On the evening of February 27, 2010, defendant forcibly raped the victim after dragging her into his car and driving her to an abandoned parking lot. At about 6:00 p.m., defendant drove his car closely alongside the victim as she walked through a gas station, after dark and in the pouring rain. Defendant rolled down the front passenger window of his car and asked the victim for directions and other information. The victim leaned in to defendant's car because she did not have her glasses on and could not see. Defendant at that point grabbed the victim by her jacket, pulled the top portion of her body into his car and drove away.

Defendant drove to a nearby abandoned parking lot and pulled the victim completely into the car. As the victim pleaded for her life, defendant told her "I don't want to hurt you. I don't want to kill you. Just be nice to me, be nice and you won't get hurt." The victim did not initially struggle because she was afraid. When she did begin to struggle, defendant took out a knife and pointed it at her neck, without touching her

with the knife, and asked her if she was going to be “nice.” Defendant then climbed over to the passenger seat on top of the victim and began touching her sexually. The victim was able to open the passenger door, but defendant quickly closed and locked it. Defendant forced his penis inside the victim’s vagina and moved it back and forth. Two or three times, defendant’s penis became dislodged and he reinserted it. Defendant complained that the position was “uncomfortable,” and asked the victim to hold his penis to help him reinsert it. After about four minutes, defendant stopped and said he wanted to take the victim “somewhere nice.”

Defendant took the victim back to the gas station and told her to continue walking to the store as she had planned. Defendant asked the victim where she lived and for her cell phone number. The victim lied about where she lived, but gave the defendant her cell phone number. The victim went home, where her sister called police. The victim underwent a sexual assault exam, from which evidence implicating defendant was collected.

Defendant called the victim on her cell phone about a week later and asked to meet her and take her to a hotel. Her sister hung up the phone. About three months later, the victim and a friend were walking near their apartment complex when defendant approached them in a truck, blocked their path, and asked them for directions through the passenger window, as he had on the prior occasion. When the two tried to leave, the defendant pulled forward and tapped the victim with his truck. The two ran to the victim’s home and called police. Defendant was arrested shortly thereafter.

On May 31, 2011, the People filed an information charging defendant: in count 1 with kidnapping to commit rape (Pen. Code, § 209, subd. (b)(1))¹; in counts 2, 3 and 4 with forcible rape (§ 261, subd. (a)(2)); and in count 5 with sexual battery by restraint (§ 243.4, subd. (a)). The People further alleged as to the rape counts that defendant used a deadly weapon within the meaning of section 12022.3, subdivision (a), and that the defendant kidnapped the victim within the meaning of section 667.61, subdivisions (a), (b) and (e).

At trial the People were allowed to introduce evidence of defendant's prior sex crimes. Defendant had misdemeanor convictions in 1985 and 1992 for indecent exposure, a misdemeanor conviction in 2000 for annoying or molesting children, and a 2008 felony conviction for sexual battery and annoying a child, for which he served one year in jail. The 1985 conviction resulted from defendant being arrested for exposing himself to two young girls, ages 8 and 9, at the beach. The 2008 felony conviction resulted from defendant picking up the 16-year-old daughter of his girlfriend from a bus stop and forcibly attempting to have sex with her in his truck. Defendant hit the girl when she resisted and hit him and told her he "likes to get feisty." Defendant was still on felony probation at the time of the current crimes and was a registered sex offender.

The jury found defendant guilty of the rape and sexual battery charges. The jury deadlocked on the kidnapping charge and all of the enhancement allegations, which were subsequently dismissed and stricken.

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

The trial court sentenced defendant to 25 years in prison as follows: aggravated, consecutive eight-year terms on each of the three rape counts plus a consecutive term of one year (one-third the middle term) for the sexual battery. In doing so, the trial court explained its reasoning: “All right. The Court finds the following aggravating factors both for running the counts consecutive and for giving the aggravated term as to each count: [Defendant] has four misdemeanor convictions, one felony conviction, three of those five convictions are for sexual offenses, two of which at least on their face involve minors. [¶] As I stated previously on the record, [defendant] is a sexual predator. The Court will note the similarities between Jane Doe and his prior victim, who testified in this case, both being young black women. And [defendant’s] conduct, as [the prosecutor] pointed out, is increasing in seriousness, to say the least. [¶] The Court finds him to be an extreme danger to the public and for those reasons, will run all counts consecutive as the law permits and give him the aggravated term as to each count.”

This appeal followed.

DISCUSSION

1. The Evidence Supports Three Separate Convictions for Forcible Rape

Defendant challenges two of his three convictions for forcible rape. The Penal Code defines this crime as follows: “(a) Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances . . . (2) Where it 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 or another.” (§ 261, subd. (a).)

Defendant argues that the evidence—specifically that defendant re-inserted his penis into the victim’s vagina two or three times after it became dislodged—supports only one conviction for forcible rape rather than three. He attempts to distinguish the large and unified body of case law on this subject by arguing that the following circumstances negate a conviction for more than one count of forcible rape: (1) his penis became dislodged because of the awkward position rather than by the victim’s struggles;² (2) the victim did not change positions during the assault; (3) the offense did not take place over a protracted period of time; and (4) he did not threaten the victim or perform any “intervening act of force”³ between insertions.

A judgment of conviction will not be set aside for insufficiency of the evidence unless it is clearly shown there is no basis on which the evidence can support the jury’s conclusion. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) When considering the sufficiency of the evidence, we review the entire record in the light most favorable to the verdict drawing all reasonable inferences from the evidence that support that verdict. (*People v. Farnam* (2002) 28 Cal.4th 107, 143.) Given this court’s limited role on

² This is a reference to the facts in *People v. Brown* (1994) 28 Cal.App.4th 591, 601, where the appellate court held that each penetration of a victim constituted a separately punishable act. The court reasoned that “Each time [the victim] struggled and defendant’s penis came out, he could have chosen to stop his attack . . . and have been convicted of and punished for fewer counts of rape.”

³ Defendant refers to the holding in *People v. Harrison* (1989) 48 Cal.3d 321 (*Harrison*), discussed below, in which the California Supreme Court held that each of the penetrations committed during the assault “and highlighted by intervening acts of force,” constituted a separate violation. (*Id.* at p. 334.)

appeal, defendant bears an enormous burden in claiming there was insufficient evidence to support the verdict.

The accepted case law on the subject of multiple convictions for multiple sexual penetrations on a single occasion can be summed up in the holdings of *Harrison, supra*, 48 Cal.3d 321. “Since the origin of the rape and sodomy statutes, the courts have strictly adhered to the statutory principle that a ‘penetration,’ however slight, ‘completes’ the crime. [Citations.]” (*Id.* at p. 329) The “‘essential guilt’ of sex offenses lies in the ‘outrage to the person and feelings of the victim. . . .’ The ‘slight penetration’ language confirms that this particular ‘outrage’ is deemed to occur each time the victim endures a new, unconsented sexual insertion. The Legislature, by devising a distinctly harsh sentencing scheme, has emphasized the seriousness with which society views each separate unconsented sexual act, even when all are committed on a single occasion. [Citation.]” (*Id.* at p. 330.)

As the appellant, defendant has the burden to demonstrate error. However, he has presented no case law, whatsoever, to support his arguments that he can be convicted of only one count of rape where it was not the victim’s struggling that dislodged his penis; where he and the victim did not change positions between insertions; or where the assault took place over less than a stated minimum period of time. Given the clear and specific language in *Harrison* that each separate, unconsented-to insertion, no matter how slight and even when committed on a single occasion, constitutes a discrete outrage to the victim and justifies a separate sentence, defendant has not met his burden on appeal to establish error on these points.

Defendant's claim that he could be convicted of only one rape under *Harrison* because he did not threaten, assault or hurt the victim between each insertion is also without merit. The *Harrison* court stated only that the act must be accomplished by force, and that force must precede the act. A defendant may be guilty of rape by applying the same or continuing means of force or fear (i.e., physically restraining the victim throughout the entire assault; pointing a weapon at the victim while performing the repeated acts; or threatening the victim's life or safety and causing the victim to remain in a state of fear), so long as it is substantially different and in excess of that required to commit the act. Here, the victim testified that defendant told her after he had pulled her into his car and before he began to sexually assault her that "I don't want to hurt you. I don't want to kill you. Just be nice to me, be nice, and you won't get hurt." She also testified that defendant grabbed her arm when she began to struggle and tried to sit up in the front passenger seat, in order "to make me not move or anything or go anywhere." At that point, defendant also pulled out a knife and pointed it at the victim's neck, but without touching her with it. This evidence shows that defendant both restrained the victim and caused her to remain in a state of fear throughout the several insertions, thus accomplishing each insertion against the victim's will by force and fear under section 261, subdivision (a)(2).

2. *The Trial Court Did Not Abuse Its Discretion At Sentencing*

Defendant argues that, even if he was properly convicted of all three counts of forcible rape, the trial court abused its discretion when it sentenced him to the full term of eight years for each count *and* ran the terms consecutively under section 667.6,

subdivision (c), rather than using the less onerous principal/subordinate scheme provided by section 1170.1.

Section 667.6, subdivision (c) allows the courts to impose a much harsher overall sentence for specified multiple sex offenses than does the more general section 1170.1. Under section 1170.1, when a person is convicted of two or more felonies, the actual prison sentence is determined by adding to the longest term imposed (the “principal” term) the sum of one-third of the middle term for each additional felony term to be served consecutively (the “subordinate” terms). Alternatively, section 667.6, subdivision (c), allows a sentencing court to impose “a full, separate, and consecutive term” for crimes such as forcible rape that are committed against “the same victim on the same occasion.”

In choosing to sentence a defendant under section 667.6, subdivision (c), the trial court must ““state a reason for imposing a consecutive sentence and a separate reason for imposing a full consecutive sentence as opposed to one-third the middle term as provided in section 1170.1.” [Citation.] . . . [H]owever, the court may “repeat the same reasons.” [Citation.]’ [Citation.] ‘What is required is an identification of the criteria which justify use of the drastically harsher provisions of section 667.6, subdivision (c). The crucial factor, in our view, is that the record reflect recognition on the part of the trial court that it is making a separate and additional choice in sentencing under section 667.6, subdivision (c).’ [Citation.] In making this determination, ‘[t]he sentencing judge is to be guided by the criteria listed in rule 4.425, which incorporates rules 4.421 [(aggravating circumstances)] and 4.423[(mitigating circumstances)], as well as any other reasonably

related criteria as provided in rule 4.408 [(enumerated criteria not exclusive)].’

[Citation.]” (*People v. Quintanilla* (2009) 170 Cal.App.4th 406, 411.)

Here, the trial court clearly stated its reasons for imposing the three forcible rape sentences consecutively and for the full, aggravated term of eight years on each count and acknowledged that the reasons were the same for each of these two sentencing choices.

The reasons were that defendant engaged in violent conduct that indicates a serious danger to society (Rule 4.421(b)(1)) and that defendant’s convictions were of increasing seriousness (Rule 4.421(b)(2)). As stated above, the trial court is allowed to use the same reasons for both imposing consecutive terms and imposing the full terms under section 667.6, subdivision (c), as long as it acknowledges that it is making a “separate and additional choice” to impose the full terms. The trial court did so here when it stated, “The Court finds the following aggravating factors both for running the counts consecutive and for giving the aggravated term as to each count” before discussing the aggravating factors.

Defendant challenges the factual basis for the trial court’s findings that he is a “dangerous sexual predator” because none of his previous sexual offenses were violent or resulted in prison time. We conclude that the record supports the trial court’s finding on this issue because: at least three of defendant’s previous victims were minors, meaning they are particularly vulnerable, defendant got very physical with both the current victim and the victim in the 2008 conviction, defendant approached his victims in public places, and defendant again approached the current victim and a friend in a public place and attempted to lure them into his vehicle, which appears to be his *modus operandi*. In

addition, the circumstance that defendant avoided prison commitments for his crimes in the past reasonably supports a conclusion that multiple punishments short of a long prison term were unsuccessful in either dissuading defendant from continuing his assaults or keeping him off the streets long enough to ensure public safety.

For the reasons stated above, we conclude that the trial court did not abuse its discretion when it chose to impose full, consecutive sentences for each of the forcible rape convictions.

DISPOSITION

The conviction and sentence are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

RICHLI
J.

MILLER
J.