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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.

FRANK SOTO,

Defendant and Appellant.

E055773

(Super.Ct.No. FVA1101176)

OPINION

APPEAL from the Superior Court of San Bernardino County. Ingrid Adamson Uhler, Judge. Affirmed.

John F. Schuck, 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, Bradley Weinreb and William M. Wood, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Frank Soto guilty of (1) attempted forcible rape (Pen. Code, §§ 664, 261, subd. (a)(2));¹ (2) misdemeanor battery (§ 242); and (3) kidnapping (§ 207). The trial court sentenced defendant to prison for a term of eight years. Defendant raises three issues on appeal: (1) his trial counsel was ineffective for failing to request the jury be instructed on the law of voluntary intoxication as it relates to attempted rape; (2) his trial counsel was ineffective for not objecting to the instruction that battery is a lesser included offense of attempted rape; and (3) the trial court abused its discretion by imposing the upper prison term for the kidnapping conviction. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. PROSECUTION'S CASE

The female victim is five feet, four inches tall and weighs 125 pounds. Defendant is male, six feet tall, and 180 pounds. The victim met defendant one time prior to the incident at issue in this case. The victim met defendant through a friend; the victim and defendant have not dated.

On July 29, 2011, at approximately 7:00 p.m., the victim went to her friend Jacob's house in Fontana. The victim then went to a pool hall for about one hour, and then returned to Jacob's house. Defendant was also at Jacob's house because there was a party taking place. While at Jacob's house, the victim drank one beer and smoked marijuana.

¹ All subsequent statutory references will be to the Penal Code unless indicated.

At approximately 2:00 a.m., the victim and defendant decided to leave the party to get food. Defendant drove his vehicle, a Jeep, and the victim went with him—they were the only two people in the Jeep. The victim asked defendant where they were going, but defendant did not respond. Defendant stopped the vehicle and tried to touch the victim's hair with his hand. The victim struck defendant's hand with her hand and said, "Don't touch me." Defendant grabbed the victim's arm and said, "Shut the fuck up." The victim exited the car and ran. Defendant chased after the victim and pushed her to the ground so that she was on her back. Defendant placed his hands over the victim's nose and mouth, causing her to be unable to breathe or scream.

When defendant removed his hands from the victim's face, he held the victim by her shoulder and instructed her to return to the Jeep. The victim walked back to the vehicle because she was scared, and defendant was physically walking her toward the Jeep. Defendant placed the victim in the passenger seat and closed the door. The victim again exited the Jeep and ran. Defendant again chased after the victim. Defendant caught the victim and placed her in a chokehold. The victim told defendant she would return to the Jeep, and defendant released the chokehold. Defendant physically walked the victim back to the Jeep by holding her arm and shoulder.

Defendant placed the victim in the passenger seat, and then began driving. After approximately two minutes, defendant and the victim arrived on a dead-end street where there are no buildings, just dirt fields. The victim tried to jump out of the Jeep while it was moving, but defendant grabbed her by her hair. The victim's foot was dragging outside the Jeep, so she placed it back inside the vehicle and closed the door, due to

defendant holding her by her hair. Defendant stopped the vehicle at the end of the cul-de-sac, where the street dead-ends into railroad tracks. The victim tried to exit the Jeep through the window. The victim was able to move half of her body through the window, but defendant grabbed her leg and pulled her back inside the vehicle.

After more struggling, the victim was able to exit the Jeep. The victim ran, but defendant caught her and pushed her down into a pile of dirt, so that she was lying on her back. Defendant removed the victim's jeans, using one hand; his other hand pinned the victim to the ground. The victim repeatedly tried to stand up, but defendant continued to push her down. After removing the victim's jeans, defendant removed the victim's panties. The victim said to defendant, "Get off of me. Leave me alone. Don't touch me. Please stop."

Defendant pulled his pants down and tried to place his penis in the victim's vagina approximately seven times. Defendant's penis touched the victim's vagina, but the victim squeezed her legs together to prevent defendant from fully penetrating her vagina. At one point, defendant penetrated the victim's vagina approximately one-half inch. Defendant repeatedly said, "[I'm] drunk and [I] can't do this, [I'm] drunk." Defendant pulled himself off the victim and told her, "We could do it better in the car." The victim put her jeans back on, but could not find her panties.

The victim returned to defendant's Jeep, although she did not want to. Defendant instructed the victim to go into the backseat portion of the vehicle and remove her jeans. The victim said, "No . . . [c]an you take me home?" Defendant replied, "No, no, let's just do this." Defendant again instructed the victim to take off

her jeans. The victim did not remove her pants, and defendant continued to tell her to take off her jeans. Defendant, who was also in the backseat with the victim, became angry when she did not remove her pants. Defendant said, “Take off your pants. I don’t want to hurt you.”

Defendant pulled the victim’s arm and moved her so that she was on top of him while he was seated. The victim told defendant, “If you could just take me home [then] I won’t say nothing.” Defendant responded, “Let’s just finish.” A car drove by, which scared defendant. Defendant allowed the victim to move to the passenger seat, and he moved to the driver’s seat.

Defendant drove to the dirt pile where he initially pushed the victim down. Defendant retrieved his wallet and the victim’s sandals from the sidewalk. When defendant returned to the car he said, “Sorry. I don’t know what I was thinking.” Defendant began driving again. The victim asked defendant to take her home. Defendant said, “No. Let’s just go get something to eat.” The victim pointed out a Carl’s Jr. and a Jack in the Box.

Defendant drove to the Carl’s Jr.; defendant and the victim went through the restaurant’s drive-thru. The victim did not try to exit the car at the restaurant because she believed defendant would take her home. The victim did not ask anyone at the restaurant for help because she was scared for her safety. After waiting approximately five minutes for their food, the victim again asked defendant to take to her home. Defendant said, “If we could just finish this, then I’ll take you home, I promise,” referring to sexual intercourse.

Defendant asked the victim where she wanted to go. The victim directed defendant toward Jacob's house. The victim wanted to be near Jacob's house so she could run for help. Defendant parked the car almost across the street from Jacob's home. Defendant instructed the victim to get into the backseat area of the Jeep and remove her jeans. The victim repeatedly told defendant "No." Defendant looked angry, which scared the victim.

Once the two were in the backseat, defendant tried to remove the victim's pants by pulling on them with both of his hands. Defendant's pants were halfway off, and his penis was exposed. The victim saw defendant's penis was erect. Defendant began masturbating. When defendant stopped masturbating he leaned on top of the victim and pulled her pants down to her knees. The victim was not wearing panties due to the prior incident at the dirt pile.

Defendant tried "[a] couple" times placing his penis in the victim's vagina, but he was mostly unsuccessful. The victim moved and squeezed her legs together. At one point, defendant's penis penetrated the victim's vagina approximately one-half of an inch. Defendant said to the victim, "I know you don't want to, but I do." The victim told defendant she did not feel well, and acted as though she were going to vomit. The victim asked to go outside of the car to breathe fresh air. Defendant said, "Okay," and allowed the victim to exit the car. Defendant and the victim pulled up their pants. The victim sat on the sidewalk, and defendant sat next to her. Defendant said, "Oh, I'm sorry about this. I don't know what I'm thinking." Defendant rubbed the victim's back.

The victim asked defendant if she could go to the store to buy a beverage. Defendant said, “No.” The victim replied, “I’m just going to get a drink and I’ll be fine.” Defendant said, “Okay.” The victim began walking toward a store. Defendant walked behind her, but then told her to wait because he forgot his wallet. When the victim saw defendant open the Jeep door, she ran across the street to a bakery. When the victim entered the bakery it was approximately 5:45 a.m., and the victim was not wearing shoes.

The victim ran behind the bakery counter and threw herself on the floor to hide. The victim told the cashier that a person was trying to rape her. A bakery employee drove the victim to Jacob’s house. At Jacob’s house, the victim told Jacob and her cousin that defendant tried to rape her. The victim’s cousin called the victim’s aunt, who in turn called the police.

The victim spoke to San Bernardino County Sheriff’s Deputy Norkunas. The victim appeared “distracted” and “worn down.” The victim’s shirt was dirty, torn, and wrinkled. The victim’s makeup was smeared and she had injuries on her face. The victim had bruises on her arms and hip. The victim’s foot was injured from being dragged on the ground when she tried to jump from the moving the vehicle.

Inside defendant’s Jeep, San Bernardino County Sheriff’s Deputy McDaniel found cold food from Carl’s Jr. A security tape from the bakery showed the victim running inside, looking around, and hiding behind the counter. Deputy Norkunas found the victim to be coherent, and not intoxicated. The victim told the deputy that

defendant's penis entered her vagina approximately one-half inch when they were stopped at the cul-de-sac, and when they were stopped near Jacob's house.

The victim was taken to a hospital where she was examined by a forensic nurse. The nurse saw: holes where the victim's eyebrow piercing had been pulled out; a bruise on the victim's right forearm; a bruise on the back of her right arm; multiple bruises and an abrasion on her left arm; a scratch in the right upper chest/breast area; two scratches on her back, near her bra line; an abrasion at her waist, near her jeans line; a scratch several inches long on her right buttock; bruises on her cheek, chin, and mouth; an abrasion on her upper lip, where it likely struck her teeth; bruises on her legs, near the knee; scrapes and bruises on her right foot; and bruises on her right ankle.

Vaginal and anal examinations revealed an abrasive injury at the base of the victim's vaginal opening. The abrasion was consistent with defendant being on top of the victim, defendant's penis partially penetrating the victim's vagina, while the victim squeezed her legs together to prevent further penetration.

Defendant's interview with Deputy McDaniel was recorded. The recording was played during trial. During the interview, defendant told the deputy people at the party were drinking, and people were drinking at the pool hall. Defendant said he recalled driving a friend home, but then he "blanked" out and did not remember anything until the following morning at 6:00 a.m. Defendant stated he did not recall going to Carl's Jr., although there was food from Carl's Jr. in his car. Deputy McDaniel informed defendant that defendant and the victim went to Carl's Jr. together.

Deputy McDaniel told defendant about the victim's accusations that defendant tried to rape her. The deputy said defendant did not appear to be a rapist. The deputy then said, "It's the alcohol, it's the alcohol that made you do that, I'm sure. I'm not positive, I don't know you, I wasn't there. . . ." Defendant responded, "Even with alcohol, I never done nothing like that. Not even close." Defendant explained that he is 19 years old, but his friend was buying him beer, so he drank "[b]eer after beer." Defendant agreed to let the deputy search his car. In the car, Deputy McDaniel found a woman's shirt.

Defendant slowly began recalling some of the events of the night. Defendant recalled driving to his house and driving to work. Defendant recalled seeing a person walking in the middle of a street.

B. DEFENDANT'S CASE

We now present defendant's version of the events. On the night of July 29 and 30, 2011, defendant went to Jacob's home and then to a pool hall. Defendant went to the pool hall at approximately midnight and left at 2:00 a.m. to return to Jacob's house. Defendant had four or five beers while at Jacob's house. Defendant did not smoke marijuana at the party. At approximately 4:00 a.m. defendant and the victim left the party to purchase more beer. Defendant drove his vehicle; he and the victim were alone in the Jeep.

On the way to purchase beer, defendant decided to stop at Carl's Jr. He paid for the Carl's Jr. food using money from his wallet. Defendant and the victim waited

approximately 10 minutes for their food. Defendant placed his wallet in the vehicle's cup holder. After receiving their order, defendant drove back toward Jacob's house.

On the way back to the house, defendant realized his wallet was missing. Defendant accused the victim of stealing his wallet. As defendant searched for his wallet, the victim handed him the wallet. Defendant called the victim a bitch. The victim became angry and slapped defendant. Defendant pushed the victim into the passenger door. The victim repeatedly slapped defendant as he continued driving. Defendant grabbed the victim's neck and pushed her toward the passenger door.

The victim opened the passenger door and tried to exit the car while the car was moving at approximately 25 miles per hour. Defendant grabbed the victim's left upper arm or shoulder, stopping her from leaving the car. Defendant then stopped the car and instructed the victim to "get out." The victim exited the car, and defendant drove away. Defendant left the victim approximately one mile from Jacob's house. Defendant began driving home, but then turned around and went back to find the victim.

Upon finding the victim, defendant offered her a ride home. The victim rejected defendant's offer and "ran off." Defendant drove home. Defendant never attempted to engage in sexual intercourse with the victim. Defendant arrived home around 5:25 a.m. Defendant stayed at home for approximately 20 minutes, and then left to go to work.

While at work, defendant received a telephone call from Jacob informing defendant the police were looking for him. Defendant left work and went to the police station. Defendant spoke to Deputy McDaniel. Defendant was nervous during the interview because he had struck the victim. Because defendant was scared of being

incarcerated, he lied to the deputy and said he had blacked out and did not recall much of the evening. The prosecutor asked defendant, “Did you think lying to the officers was going to clear up what had happened?” Defendant responded, “I wanted to justify my actions by what I—by blaming it on the alcohol.” The prosecutor asked defendant, “Is it fair to say you’ll lie to protect yourself?” Defendant replied, “Yes.” The prosecutor asked, “[Y]ou decided to lie to [the deputy]?” Defendant responded, “Yes.”

During closing argument, defendant’s trial counsel asserted certain facts were known, such as defendant and the victim both attended a party, and the victim willingly left the party in defendant’s vehicle. Defense counsel noted the victim was at Carl’s Jr. for five to 10 minutes, but never asked anyone for help, fought with defendant, or tried to run away. Defense counsel asserted the victim’s testimony that she repeatedly tried to run away from defendant was not credible because “the one place where there are tons of people, where there’s lots of help, where there are actual witnesses,” she chose not to run away.

Defendant’s trial counsel faulted the victim for inconsistencies in her story and for requesting the bakery employee take her home instead of contacting police. Defense counsel suggested the victim fabricated the rape story because she did not want to admit to her aunt that she stole defendant’s wallet. Defense counsel also faulted the prosecutor for failing to provide DNA evidence linking defendant to the victim.

DISCUSSION

A. VOLUNTARY INTOXICATION

1. *PROCEDURAL HISTORY*

During a discussion of jury instructions, the following exchange occurred:

“The Court: . . . Obviously, we’ve heard [defendant’s] prior inconsistent statement to law enforcement. There’s a lot of mention about his level of intoxication.

“[Defense counsel]: Right.

“The Court: Intoxication voluntary, obviously, can be a defense to specific intent crimes. You’re probably most likely going to get attempted rape as a lesser included offense[] to all the charges . . . based on [the victim’s] testimony, okay? [¶] . . . [¶] Now, in regards to the intoxication, now that he’s testified, he makes it very clear that he does remember what happened, that intoxication really is not a defense because he’s just saying he didn’t do it.

“[Defense counsel]: Correct.

“The Court: So I don’t know if you’re requesting voluntary intoxication or— because it would be inconsistent with your defense. You’re not requesting it?

“[Defense counsel]: At this point I am not.

“The Court: Okay. So I just want to make that very clear.”

2. *ANALYSIS*

Defendant contends his trial counsel was ineffective for failing to request a jury instruction on the topic of voluntary intoxication as it relates to attempted rape. We disagree.

“[A] defendant claiming the ineffective assistance of counsel is required to show both that counsel’s performance was deficient and that counsel’s errors prejudiced the defense. [Citation.] . . . ‘[T]his requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial’” (*People v. Hernandez* (2012) 53 Cal.4th 1095, 1105.) “[C]ounsel does not render ineffective assistance by choosing one or several theories of defense over another. [Citation.]” (*People v. Cunningham* (2001) 25 Cal.4th 926, 1007.)

A trial court is obligated to act on its own in instructing “on a particular defense only if it appears the defendant is relying on such a defense, or substantial evidence supports the defense and it is consistent with defendant’s theory of the case. [Citation.]” (*People v. Booker* (2011) 51 Cal.4th 141, 179.) A trial court does not have a sua sponte duty to give a pinpoint instruction on the law of voluntary intoxication (*People v. Pearson* (2012) 53 Cal.4th 306, 325), thus, defense counsel must request such an instruction.

Defendant testified that he lied to Deputy McDaniel about drinking so much alcohol that he blacked out. Defendant explained that he was scared of being incarcerated so he lied. In particular, defendant testified that he lied by “blaming it on the alcohol.” At trial, it was established that defendant was 19 years old, six feet tall, and 180 pounds. Defendant testified that he drank four or five beers at Jacob’s house on the night of the incident. Defendant denied that he attempted to engage in sexual intercourse with the victim.

Given defendant's testimony, it was reasonable for defense counsel to decline the voluntary intoxication instruction because defendant was not claiming to be drunk when attacking the victim, instead he testified the attempted rape did not occur. (See *People v. Saille* (1991) 54 Cal.3d 1103, 1117-1120 [voluntary intoxication negates specific intent, it does not set forth a defense].) Further, defendant's testimony concerning the amount of beer he consumed could contradict a conclusion that he was intoxicated, given his height, weight, and the length of the party. In other words, defense counsel chose to follow the innocence defense rather than the voluntary intoxication defense. Trial counsel's selection was reasonable given the evidence produced at trial. The choice to present the innocence defense over the intoxication defense is not a decision that creates ineffective assistance of counsel. (*People v. Cunningham, supra*, 5 Cal.4th at p. 1007.) Accordingly, we conclude trial counsel did not render ineffective assistance.

Defendant contends "regardless of the innocence theory of defense, the jury needed guidance regarding how to consider the intoxication evidence should it reject this defense, which it did in this case. No reasonably effective defense counsel would ever forego a viable fallback defense should the jury disbelieve the defense presented to it." Defendant points to the evidence that defendant was intoxicated, such as the statement that he consumed four or five beers.

Defendant's argument is not persuasive because it appears trial counsel made a tactical decision to forego the intoxication instruction given defendant's testimony that he never attempted to rape the victim. The decision to not present conflicting theories

of the case could be considered a wiser choice than presenting a “fallback” theory. (*People v. Jones* (1991) 53 Cal.3d 1115, 1138 [“The presentation of conflicting defenses is often tactically unwise because it tends to weaken counsel’s credibility with the jury.”].) In sum, it appears defendant’s trial counsel made a reasonable tactical decision, and therefore rendered effective assistance of counsel.

B. LESSER INCLUDED OFFENSE

1. *PROCEDURAL HISTORY*

Defendant was charged with the following offenses: (a) attempted forcible rape (§§ 664, 261, subd. (a)(2)—count 1); (b) forcible rape (§ 261, subd. (a)(2)—count 2); (c) forcible rape (§ 261, subd. (a)(2)—count 3); and (d) kidnapping (§ 207, subd. (a)—count 4). During a discussion about jury instructions, the trial court said, “Intoxication voluntary, obviously, can be a defense to specific intent crimes. You’re probably most likely going to get attempted rape as lesser included offenses to all the charges . . . based on [the victim’s] testimony, okay? [¶] And also I would assume that maybe you even want a battery based on his testimony in terms of maybe the last count of the lesser included offense of simple battery.” The trial court stated that it would work on the jury instructions and then meet with the parties the following day. When trial reconvened, the discussion concerning jury instructions was held off-the-record.

The jury was given the following the instruction: “If all of you find the defendant is not guilty of a greater charged crime, you may find him guilty of a lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime. A defendant may not be convicted of both a greater and lesser crime for

that same conduct. ¶ Now I will explain to you which charges are affected by this instruction: ¶ Attempted forcible rape is a lesser crime of forcible rape charged in Counts 2 and 3. ¶ False imprisonment by violence or menace is a lesser crime of kidnapping charged in Count 4. ¶ It is up to you to decide the order in which you consider each crime and the relevant evidence, but I can accept a verdict of guilty of a lesser crime only if you have found the defendant not guilty of the corresponding greater crime.”

The trial court then instructed the jury on how to complete the verdict forms. After that, the trial court said, “Follow these directions when you decide whether a defendant is guilty or not guilty of battery, which is a lesser crime of the lesser crime of attempted forcible rape as to Count 3. ¶ To prove that the defendant is guilty of battery the People must prove that” In count 3, the jury found defendant guilty of misdemeanor battery. (§ 242.)

2. ANALYSIS

Defendant contends his trial counsel was ineffective because he did not object to the trial court instructing the jury that battery is a lesser included offense of attempted forcible rape in count 3. We disagree.

As set forth *ante*, “In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel’s performance was deficient because it “fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms.” [Citations.] Unless a defendant establishes the contrary, we shall presume that “counsel’s performance fell within the wide range of

professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy.” [Citation.] If the record “sheds no light on why counsel acted or failed to act in the manner challenged,” an appellate claim of ineffective assistance of counsel must be rejected “unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.” [Citations.] If a defendant meets the burden of establishing that counsel’s performance was deficient, he or she also must show that counsel’s deficiencies resulted in prejudice, that is, a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” [Citation.]’ [Citation.]” (*People v. Lopez* (2008) 42 Cal.4th 960, 966.)

Battery is not a lesser included offense of attempted rape, because a touching does not need to occur in an attempted rape. (*People v. Marshall* (1997) 15 Cal.4th 1, 39.) There is nothing in the record indicating why trial counsel failed to object to the trial court incorrectly instructing the jury that battery is a lesser included offense of attempted forcible rape. For the sake of judicial efficiency, we will assume there is no possible satisfactory explanation for trial counsel’s failure to raise an objection, and therefore assume counsel’s performance was deficient.

We now turn to the issue of prejudice. Battery is a lesser included offense of forcible rape. (*People v. Lema* (1987) 188 Cal.App.3d 1541, 1545.) The offense charged in count 3 was forcible rape. (§ 261, subd. (a)(2).) Accordingly, the trial court was incorrect when it instructed the jury that battery was a lesser included offense of the other lesser included offense in count 3—attempted forcible rape; however, the trial

court was correct in instructing the jury that battery is a lesser included offense of the charged crime—forcible rape. In other words, the trial court’s error was stating that battery is a lesser included offense of attempted forcible rape, as opposed to forcible rape. Thus, it was proper to instruct the jury on battery as a lesser included offense in count 3, but the wording of the jury instruction should have been edited to reflect battery is a lesser included offense of forcible rape, as opposed to attempted forcible rape.

Since battery is a lesser included offense of the charged crime, trial counsel’s failure to object to the wording of the jury instruction did not cause defendant to suffer prejudice. While the wording of the jury instruction might have changed if counsel had objected, the jury would have still been instructed on battery being a lesser included offense in count 3. Therefore, the result of the trial would not have been different. In sum, defendant did not suffer prejudice due to his trial counsel’s failure to object to the battery instruction.

Defendant acknowledges battery is a lesser included offense of forcible rape, but asserts “the jury found [defendant] guilty of battery on count 3 as a lesser included offense of attempted rape, *not* a lesser included offense of rape.” Defendant asserts the jury may have believed the following: if battery is a lesser included offense of attempted forcible rape, and touching is not required for attempted rape, then touching is not required for battery.

Defendant’s argument is flawed for two reasons. First, the trial court instructed the jury that battery requires touching. Specifically, the trial court said, “To prove that

the defendant is guilty of battery, the People must prove that: [¶] 1. The defendant willfully touched [the victim] in a harmful or offense manner. [¶] . . . [¶] . . . The slightest touching can be enough to commit a battery if it is done in a rude or angry way. Making contact with another person, including through her clothing, is enough. The touching does not have to cause pain or injury of any kind.” Thus, the jury was informed that touching is an important element of battery, which causes it to be unlikely that the jury believed battery could take place without touching.

Further, if the jury believed a battery could occur without touching, then the jurors necessarily would have believed a battery takes place when nothing happens, since the whole action involved in a misdemeanor battery is a harmful or offensive touching. (*People v. Delacy* (2011) 192 Cal.App.4th 1481, 1492 [“misdemeanor battery requires only a ‘simple touching’ and ‘does not necessarily entail violence’”].) Assuming the jurors are reasonably intelligent people, when reading the instructions as a whole we conclude it is unlikely the jury believed a battery could occur without a touching. (*People v. Carey* (2007) 41 Cal.4th 109, 130 [““Jurors are presumed to be intelligent, capable of understanding instructions and applying them to the facts of the case.””].)

Second, under either theory of the case—prosecution or defense—an unwanted touching occurred. For example, the prosecutor presented a case reflecting (1) multiple unwanted sexual touchings by defendant; (2) defendant pushing the victim to the ground; (3) defendant pulling the victim’s hair; and (4) defendant placing the victim in a chokehold. Meanwhile, defendant testified that he pushed the victim into the passenger

door and choked the victim. Given that both parties presented evidence of harmful or offensive touchings, we are not persuaded the result of the proceeding would have been different if trial counsel had objected to the form of the battery instruction.

C. UPPER TERM SENTENCE

1. *PROCEDURAL HISTORY*

At the beginning of the sentencing hearing, the trial court gave an indicated sentence. The trial court believed the sentence for the kidnapping conviction should be the principal term and the upper term of eight years should be imposed. The trial court explained the upper term was appropriate because (1) the crimes against the victim “occurred over hours”; (2) the crimes involved violence and a threat of great bodily harm; (3) defendant took advantage of a position of trust or confidence; and (4) the victim was particularly vulnerable due to the locations where defendant took her.

As factors in mitigation, the trial court cited defendant’s “very minor criminal history.” The trial court was unsure about the facts of defendant’s prior juvenile offense, but it commented that the offense appeared to have occurred in 2008 or 2009 and involve a controlled substance charge that was reduced to public intoxication.

Defendant’s trial counsel argued the trial court should impose the lower term. Counsel cited (1) defendant’s “insignificant criminal record”; (2) defendant’s youth (age 19); (3) the fact that the convictions in this case would constitute two strikes, thus making defendant eligible for a life term if he were to commit another felony; (4) defendant not being a danger to the community, given his “insignificant” and non-violent criminal history; and (5) defendant would qualify for probation if the

convictions in this case were not strikes and were not felonies. Further, defense counsel asserted defendant did not take advantage of a position of trust in this case because he had only met the victim one time prior to July 29 and the victim voluntarily left the party with defendant.

The trial court explained the victim volunteered to go with defendant to purchase food, “but she certainly didn’t volunteer to be placed in the position that she was placed in.” Further, the trial court expressed concern about defendant’s alcohol and/or drug use. The trial court noted that this case involved defendant drinking alcohol, and defendant’s juvenile offense also involved intoxication. The trial court concluded, “[H]e has an issue with the consumption of alcoholic beverages. It is not a good mix for the defendant. Once he does, obviously, ingest significant amounts of alcoholic beverages, it either makes him commit violent acts, as he did in this situation, or causes some issues for him in the community, and obviously he has no desire in that sense to prevent that from happening in the future because there is no indication that the defendant even admits that he has any issues in terms of the consumption of alcoholic beverages. So I think in that context that obviously he does pose a serious threat of danger to the community.”

The trial court selected the sentence for the kidnapping conviction as the principal term. The trial court explained its reasons for choosing the aggravated term: The victim “was placed in a position of extreme vulnerability; that . . . the defendant, through use of driving a motor vehicle, took her to areas in which she could not seek help; and the fact that . . . the threat of great bodily injury or actual injury was imposed

on [the victim] at the time. And even though they had just met, I think that, obviously, he did take advantage of a position of trust or confidence because when she did volunteer to go with the defendant, it was not to put her in the situation that she was placed into, and so I think that he took advantage of her confidence or trust in him when he engaged in these very serious and violent acts.” The trial court imposed the upper prison term of eight years for the kidnapping conviction.

2. ANALYSIS

Defendant contends the trial court erred by imposing the upper prison term for the kidnapping conviction because the sentencing factors only support imposition of the midterm. Defendant contends his kidnapping offense was no worse than other kidnapping offenses because (1) the victim did not suffer great bodily harm; (2) defendant did not take advantage of a position of trust to commit the offense; (3) the victim was no more vulnerable than any other kidnapped woman; and (4) the only applicable aggravating factor—the crime occurring over a period of hours—is balanced by the mitigating factors of (a) defendant’s minimal criminal history, (b) defendant was mentally or physically impaired at the time of the kidnapping, due to voluntary intoxication, and (c) defendant was gainfully employed at the time of the offense. We disagree.

The People assert defendant forfeited the arguments related to (1) great bodily harm, and (2) the victim’s vulnerability, by failing to raise those specific arguments in the trial court. (*People v. de Soto* (1997) 54 Cal.App.4th 1, 8 [specific objections must be raised at the time of sentencing or the claim of error is forfeited].) While we agree

that all four of the specific arguments raised on appeal were not presented at the trial court, we will address the entirety of defendant's argument because it is easily resolved.

Sentencing choices are reviewed for an abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) "A court abuses its discretion 'whenever the court exceeds the bounds of reason, all of the circumstances being considered.' [Citation.] We will not interfere with the trial court's exercise of discretion 'when it has considered all facts bearing on the offense and the defendant to be sentenced.' [Citation.]" (*People v. Downey* (2000) 82 Cal.App.4th 899, 909-910.)

Circumstances in aggravation that support the imposition of an upper term sentence include: (1) the crime involved a threat of great bodily harm or other acts disclosing a high degree of cruelty, viciousness, or callousness; (2) the victim was particularly vulnerable; (3) the defendant took advantage of a position of trust or confidence to commit the offense; (4) the defendant engaged in violent conduct that indicates a danger to society; and (5) defendant's prior sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness. (Cal. Rules of Court, rule 4.421(a)(1), (a)(3), (a)(11), (b)(1) & (b)(2).) "A single factor in aggravation will support imposition of an upper term. [Citation.]" (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433.)

The trial court found the kidnapping presented a great threat of bodily harm. (Cal. Rules of Court, rule 4.421(a)(1).) The trial court's finding is supported by (1) defendant placing the victim in a chokehold when she ran away from him; and (2) defendant placing his hands over the victim's mouth and nose so that she could not

breathe after she tried to run away from him. Given that defendant limited the victim's air supply on two occasions, the kidnapping presented a great threat of bodily harm. Accordingly, the trial court's finding was within reason.

Second, a victim of a sexual assault is considered particularly vulnerable when she is isolated in a defendant's residence. (*People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, 601.) In this case, the victim was isolated in defendant's vehicle, and he drove her to secluded area surrounded by fields and railroad tracks. Given the isolated place where defendant transported the victim, the trial court could reasonably conclude the victim was particularly vulnerable. (Cal. Rules of Court, rule 4.421(a)(3).)

Third, the trial court could reasonably conclude the victim took advantage of a position of trust because he used his position as a supposed friend to lure the victim into his vehicle. (Cal. Rules of Court, rule 4.421(a)(11).) Once the victim voluntarily entered the vehicle, defendant kidnapped her. By using his position to lure the victim, defendant made the offense decidedly worse because the victim was unsuspecting of the trouble awaiting her, which permitted defendant to move the victim to an unpopulated area. Accordingly, the trial court could reasonably conclude defendant took advantage of a position of trust.

Fourth, the record reflects defendant had consumed some alcohol on the night of the kidnapping, and he inflicted various injuries on the victim while kidnapping her. Defendant's probation report reflects charges of (1) being under the influence of a controlled substance, and (2) disorderly conduct, on June 14, 2008. The disorderly conduct allegation was found true and defendant was placed on probation for 36

months. On January 26, 2009, a juvenile court found true the allegation that defendant failed to obey a juvenile court order. Given defendant's apparent substance abuse issues and the violence displayed in this case—the choking and smothering—the trial court could reasonably conclude defendant engaged in violent behavior that indicates he is a danger to society. (Cal. Rules of Court, rule 4.421(b)(1).)

As set forth *ante*, defendant was 19 years old at the time the kidnapping occurred in 2011. Defendant had two sustained petitions in juvenile court. One allegation in the juvenile court pertained to being under the influence of a controlled substance; however, only the disorderly conduct allegation was found true. In 2009, when defendant disobeyed a juvenile court order, he was required to spend 20 days in juvenile hall. In 2011, defendant kidnapped a woman from a party and attempted to rape her. Defendant's offenses are growing increasingly violent and serious. (Cal. Rules of Court, rule 4.421(b)(2).) Even throughout the incident at issue in this instant case, defendant became increasingly violent.

Initially, defendant grabbed the victim's arm and yelled at her. Then defendant pushed the victim down and placed his hands on her face, preventing her from breathing. After the victim escaped a second time, defendant placed her in a chokehold. When the victim tried to escape from defendant's moving car, he grabbed her by her hair. Eventually, defendant drove the victim to an isolated cul-de-sac where he attempted to rape her. Given the escalating nature of defendant's offenses, the trial court could reasonably conclude defendant's offenses from 2008 to 2011 have increased in seriousness.

In sum, there are a variety of factors in aggravation that are supported by the record. The trial court's determination that these factors outweigh the mitigating factors is reasonable, given the many aggravating issues. Accordingly, we conclude the trial court did not abuse its discretion by sentencing defendant to the upper term.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.