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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.

JESSE PEYTON ROSE,

Defendant and Appellant.

E064037

(Super.Ct.No. FVI1401637)

OPINION

APPEAL from the Superior Court of San Bernardino County. Debra Harris,
Judge. Affirmed, with directions.

Arthur B. Martin, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Kelley
Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jesse Peyton Rose appeals from a judgment of conviction for murder (Pen. Code, § 187, sub. (a)),¹ rape (§ 261, subd. (a)(2)), and elder abuse resulting in death. (§ 368, subd. (b)(1) & (b)(3)(B).²) The jury found true a rape special circumstance alleged under section 190.2, subdivision (a)(17)(C). Personal use of a deadly weapon allegations were also found true. (§ 12022, subd. (b)(1).)

Defendant was sentenced to life imprisonment without the possibility of parole for the murder, and also received a consecutive term of 22 years computed as follows: four years for the elder abuse charge and a seven-year enhancement because the abuse resulted in death, eight years for rape, and two years for two personal use enhancements.

Defendant's sole contention on appeal is that the consecutive sentencing for the rape and/or elder abuse violated section 654. We agree.

I

STATEMENT OF FACTS

As there were no witnesses to the murder, the sequence and circumstances were never fully established. Due to the nature of the claim raised on appeal, and the state of the record, the facts may be briefly recited.

¹ All subsequent statutory references are to the Penal Code.

² Incorrectly set forth in the first amended information dated August 29, 2014, as § 368, subdivision (a)(3).

The body of 71-year-old Sandra McKinney was found 120 feet down in a deserted mineshaft in the northern part of San Bernardino County not far from her home. She had been stabbed about 26 times, mostly on her face, neck, and head. Death most probably resulted from blood loss from two deep cuts on her neck. She had bruising on her arms, knees, genital area, and face. There was also bruising and bleeding in the area of the vaginal entrance. In addition, there was evidence that the victim might have been smothered.

Defendant, then 19 years of age, lived near the victim and had done odd jobs for her. The evidence of guilt included DNA evidence, fingerprint evidence and defendant's admissions.

Numerous blood stains were found in the victim's home although attempts had been made to clean the stains with bleach. "Drag" blood stains appeared to lead from the bedroom through the living room, out the back door and through the breezeway, and into the carport.

II

DISCUSSION

Section 654, subdivision (a), provides in part that "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." If all of the crimes of which a defendant is convicted were incidental to, or the means of accomplishing, a

single criminal objective, then only one term of imprisonment may be imposed. (*People v. Bui* (2011) 192 Cal.App.4th 1002, 1015.) However, if a defendant has multiple criminal objectives, he or she is subject to multiple punishment even if the criminal acts took place in a single course of conduct. (*People v. Perry* (2007) 154 Cal.App.4th 1521, 1525.)

At sentencing, the court made no statements explanative of its decision to sentence separately for all three offenses. In such a case, we assume that the trial court made an implicit finding that the crimes were divisible, and we must uphold that finding if it is supported by substantial evidence. (*People v. Lopez* (2011) 198 Cal.App.4th 698, 717.)

Defendant first argues that he could not be separately punished for the rape because the rape was used to support a “special circumstance” rendering him subject to life without the possibility of parole, thus triggering section 654. He is correct. (See *People v. Hensley* (2014) 59 Cal.4th 788, 828; see also *People v. Holt* (1997) 15 Cal.4th 619, 692.) The principle is that the rape has already been used as a “special circumstance” to secure the harsher sentence and therefore separate punishment must be prohibited.³

This brings us to the elder abuse conviction. The People argue that defendant’s acts of beating and repeatedly stabbing the victim were so egregious as to go “beyond” the objective of the primary offense, citing *People v. Cleveland* (2001) 87 Cal.App.4th

³ Hence, whether the trial court could reasonably have found that the rape involved a separate criminal objective is not controlling.

263, 272. In that case, the defendant entered the home of a “feeble” elderly man with the intent to rob him. Defendant then struck the victim repeatedly with a two-by-four board until the victim lost consciousness and the board broke. In holding that section 654 did not prohibit separate punishment for robbery and attempted murder, the court commented that the violence used went far beyond that necessary to effectuate the crime of robbery and therefore reflected a separate criminal intent. However, where the intended offense is murder, the degree of violence is not necessarily probative of separate intents.

First, we do believe that the trial court could have properly found separate intents, even without considering the murder or whether the rape constituted elder abuse. Section 368 criminalizes the infliction of either physical pain or mental suffering upon an elder or dependent adult. It has been held that even if a defendant intends to kill a victim, acts which deliberately increase the victim’s fear or suffering prior to the actual murder can support a separate conviction and punishment. Thus, in *People v. Brents* (2012) 53 Cal.4th 599, 610, the defendant placed the still-living victim in the trunk of a vehicle and drove several miles before killing her. The Supreme Court found it a reasonable inference that the intent to terrorize the victim was at least a *concurrent* intent to that of murder, so that defendant could properly be separately punished for the kidnapping committed at least partly for this purpose.

In this case, defendant employed multiple forms of violence against Sandra McKinney. Not only did he punch and/or beat her, he cut off her breathing and inflicted literally dozens of “sharp-force” wounds, many of which were slashing and superficial.

The terror and distress felt by the victim is unimaginable. The trial court could, and presumably did, infer that defendant—either before or after he formed the intent to kill her—intended to inflict grievous suffering upon the victim.

However, this analysis is here somewhat problematic. Defendant was not simply convicted of elder abuse, which could have been based upon “less significant” conduct such as slashing and punching. He was convicted of elder abuse *causing death*. (§ 368, subd. (b)(3)(B).)

The jury was therefore asked to, and did, find that defendant committed acts of elder abuse that caused the death of Ms. McKinney. The murder conviction was also based on acts causing death. In this context we are constrained to find that there is no substantial evidence in the record from which it can be concluded that *with respect to the offense of which defendant was convicted*, he harbored a separate intent.

When a court erroneously imposes a term in violation of section 654, the proper procedure is to direct that the sentence be stayed. (*People v. McCoy* (2012) 208 Cal.App.4th 1333, 1338.) We will so direct it with respect to the terms imposed for rape and elder abuse.

III

DISPOSITION

The trial court is directed to modify the abstract of judgment in accordance with this opinion and forward a copy of the amended abstract of judgment to the Department of Corrections. In all other respects, the judgment is affirmed.

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McKINSTER
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.