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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

BOBBY DIAL SHOALS, JR.,

Defendant and Appellant.

F063599

(Kings Sup. Ct. No. 10CM0303)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kings County. Robert S. Burns, Judge.

David Y. Stanley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Michael A. Canzoneri and Barton Bowers, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Cornell, Acting P.J., Gomes, J. and Poochigian, J.

INTRODUCTION

Appellant/defendant Bobby Dial Shoals, Jr., was convicted of multiple felony offenses based on the sexual assault of his former girlfriend. He was sentenced to 13 years plus 120 years to life, based on both the one strike law (Pen. Code,¹ § 667.61) and a second strike (§ 667, subds. (b)-(i)).

On appeal, defendant contends the court should have given the unanimity instruction to the jury, and it was improperly instructed as to whether the testimony of a single witness could support the sexual assault charges. He also contends that part of his sentence should have been stayed pursuant to section 654. We will correct defendant's sentence and otherwise affirm.

FACTS

C.B. dated defendant between February and August 2008. She ended their relationship because defendant hit her "a couple times." When they broke up, C.B. took her apartment key back from defendant. Defendant called her several times and left "nasty messages" for her, but she never returned the calls.

Around 8:00 p.m. on September 5, 2008, C.B. saw defendant at the apartment complex where his father lived. Defendant asked C.B. if he could visit her at her apartment, and promised not to argue or fight with her. C.B. agreed to a brief visit, and defendant said he would follow her back to her apartment. C.B. went back to her apartment but defendant did not arrive when he said he would.

Around midnight, Gary Jones arrived at C.B.'s apartment and stayed for several hours. C.B. and Jones were in a dating relationship. Around 3:00 a.m., defendant arrived at her apartment, knocked on the door, and tapped at the window. Defendant talked to C.B. through the window and asked to come in. C.B. said no, that she had expected him

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

earlier, but she had company and he needed to leave. Defendant said he was going to “bust all the windows out” if she did not open the door. C.B. refused to let him in, and defendant eventually left.

C.B. testified she went back to sleep, and later realized Jones left while she was sleeping. At some point after Jones left, C.B. was awakened by her bedroom light being turned on. C.B. saw defendant in her bedroom, about three feet away from her. He approached the bed and punched C.B. on the left cheek and ear with a closed fist. The force of the blow knocked C.B. off the bed and onto the floor.

Defendant continued to strike C.B. while she was on the floor. Defendant hit her in the face, mouth, shoulders, and legs. Defendant repeatedly asked C.B. if she was “f*****?” C.B. said no. Defendant grabbed her arm, told her to stand in front of him, and pulled C.B. close to him. Defendant placed two fingers inside her vagina. C.B. did not try to stop him because she was dizzy and felt physically beaten.

Defendant told C.B. to lie down on the bed. C.B. did not respond, but just stood there and cried. Defendant hit her face again, and she fell on the bed. Defendant removed his belt and said, “ ‘I think you [will] like this, this is what you want.’ ” Defendant hit C.B.’s buttocks with his belt one time. C.B. crawled toward the headboard to get away from him.

C.B. was very dizzy and in pain, and her ears were ringing. She begged him to stop. Defendant warned C.B., “ ‘[D]on’t make me hit you in the face with this belt.’ ” C.B. finally complied with his order to lie on the bed. Defendant removed his pants, got on top of her, and told her to “be quiet and to shut up.” Defendant raped C.B. C.B. was crying, and afraid he would kill her if she resisted. After he finished the sexual act, he put on his pants and left the room. C.B. remained on the bed.

C.B. was still lying on the bed when defendant returned to the bedroom. Defendant raped her again, and then committed an act of sodomy. C.B. repeatedly begged him to stop and said that it hurt. Defendant replied that he had almost completed

the sexual act. Defendant finally finished and left the room. C.B. testified she passed out.

C.B. testified that she woke up and felt defendant lying behind her. Defendant told her, “ ‘Yes, I am laying here and you are going to have to deal with it.’ ” In the morning, C.B. told defendant that she had to go to work. Defendant said that he was not keeping her against her will. C.B. left the apartment and went to work.

The victim’s injuries

C.B. told her employer what happened to her, and her employer called the police. C.B. went to the hospital for a sexual assault examination. C.B. had multiple bruises and abrasions on her head, arms, back, and buttocks. Her face was swollen and her ear was bleeding. She suffered a ruptured eardrum. She also had superficial lacerations consistent with a nonconsensual act of anal sex. It was stipulated that the physician who treated C.B. believed that a ruptured eardrum constituted great bodily injury. The prosecution introduced photographs which were taken of the victim’s injuries.

Defendant’s arrest

Later on September 6, 2008, Officer Shearer arrested defendant at his apartment on four outstanding warrants. Defendant asked what else he was being arrested for. Shearer again said he was being arrested for outstanding warrants, and defendant again asked if there was anything else. Shearer asked if there was something else to arrest him for, and defendant did not reply.

Defendant was taken to the police department, and advised of the *Miranda*² warnings. Defendant agreed to answer questions. Officer Shearer said he wanted to talk about an incident that occurred earlier that morning at C.B.’s apartment. Defendant said he did not know what Shearer was talking about, and he did not know C.B.

² *Miranda v. Arizona* (1966) 384 U.S. 436

The police collected defendant's clothing, and also obtained blood, hair, and DNA samples from him. Defendant refused to open his mouth for an oral swab.

Defendant then told Officer Shearer that he wanted to talk about the incident. Defendant said that he knew C.B. and he had been at her apartment. Defendant admitted he knocked on her window and saw another man there. He waited for the other man to leave, and then he went into the apartment and talked with C.B. He denied having sex with her that night, and denied hitting her. However, defendant said he had sex with C.B. a few days earlier. He also admitted that he tried to have anal sex with her a few days earlier, but he stopped when she said that she did not like it. C.B.'s DNA was found on biological samples taken from defendant's body.

Defendant was taken into custody. He called C.B. 96 times from jail, from September 6 to November 3, 2008. During the various calls, defendant told C.B., "don't testify please," "they can't make you do it," and "I'm sorry."

DEFENSE EVIDENCE

Defendant testified at trial and admitted he had a prior conviction for robbery in 1997. Defendant testified that he dated C.B. for eight months in 2008. Their relationship ended because C.B. was seeing other people behind his back. She wanted to see other men, and she took her apartment key from him. Defendant testified he never hit C.B. during their relationship.

Defendant testified that he saw C.B. at his parents' home on the afternoon of September 5, 2008. C.B. invited defendant to her apartment, and he agreed to come by later that day. However, he wasn't able to get there until around 11:45 p.m. He knocked on the front and back doors, but she did not respond. He tapped on the bedroom window and heard someone ask, "Who is it[?]" Defendant identified himself, and C.B. said to wait a minute. He went back to the front door and saw Gary Jones walk out. Defendant and Jones briefly spoke, and then defendant went into the apartment.

Defendant testified he went into C.B.'s bedroom and talked to her while she was in bed. They started to argue, and C.B. slapped defendant. Defendant slapped her back. C.B. kicked and threw punches at defendant, and he slapped her about three times. Defendant admitted he swung his belt and hit her leg. Defendant testified he had never touched C.B. before that night. Defendant admitted he called her a whore, but denied making any threats.

Defendant testified he went into the front room and had something to eat. About an hour later, C.B. asked him to return to the bedroom. C.B. apologized and they "kissed and made up." Defendant testified they had consensual oral sex, and twice had consensual sexual intercourse. He tried to have anal sex with her, but she asked him to stop. Defendant testified C.B. did not have any injuries on her face and never said her ear was ringing.

Later that day, C.B. called defendant and said she was going to the hospital because her ear hurt. A few hours later, the police arrived and arrested him. Defendant said the officer only talked to him about outstanding tickets. Defendant denied making some of the statements attributed to him by the officer and refusing to cooperate with the oral swab sample. Defendant admitted he did not tell the police that they had sex that night. Defendant also admitted that he repeatedly called C.B. from jail and apologized for slapping her.

The charges, convictions, and sentence

After a jury trial, defendant was convicted as charged of counts I and II, unlawful sexual intercourse by force, violence, duress, menace, or fear of immediate bodily injury (§ 261, subd. (a)(2)); count III, unlawful sexual penetration by force, violence, duress, menace, or fear of immediate bodily injury (§ 289, subd. (a)(1)); count IV, sodomy by force, violence, duress, menace, or fear of immediate bodily injury (§ 286, subd. (c)(2)); count V, battery causing serious bodily injury (§ 243, subd. (d)); and count VIII, assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)).

Defendant was found not guilty of count VII, assault with intent to commit a felony during commission of a first degree burglary (§ 220, subd. (b)), but instead the jury found him guilty of the lesser offense of misdemeanor assault (§ 240). Defendant was found not guilty of count VI, first degree burglary (§ 459).

As to counts I through IV, the jury found true the special allegations that defendant personally inflicted great bodily injury on the victim during the commission of the offense (§ 12022.8), under circumstances involving domestic violence (§ 12022.7, subd. (e)), and within the meaning of the one strike law (§ 667.61, subds. (b), (e)). As to counts V and VIII, the jury separately found defendant inflicted great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)). Defendant admitted he had one prior serious felony conviction (§ 667, subd. (a)(1)) and one prior strike conviction (§ 667, subds. (b)-(i)).

Defendant was sentenced to 13 years plus 120 years to life as follows: count I, 15 years to life, doubled to 30 years to life because of the second strike, plus a consecutive term of five years for the prior serious felony enhancement; counts II, III and IV, consecutive terms for each count of 15 years to life, doubled to 30 years to life; count V, a consecutive upper term of four years, doubled to eight years; and count VII, a concurrent term of 120 days. The court stayed the term imposed for count VIII.

DISCUSSION

I. The unanimity instruction was not required for count VIII

In count VIII, defendant was charged and convicted of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)). Defendant contends the court should have given the unanimity instruction as to this count because there were two separate acts which could have supported the offense: either defendant's acts of punching C.B. in the left cheek and ear with his closed fist, or hitting her buttocks with his belt.

A. Background

In closing argument, the prosecutor addressed the acts which supported each of the charged offenses. In the course of the argument, the prosecutor discussed C.B.'s testimony about the sequence of the sexual assault:

“[Defendant] [c]ame in ... [h]e immediately goes to the bedroom, confronts her, and when she stands up what is the first thing that he does? Pow, right here. And we have got proof of that because you saw the mark, knocks her down, continues to assault her and then beats her with a belt”

The prosecutor offered the following analysis for count VIII:

“Now, Count 8, this is the last of the counts, what we call a [section] 245, assault on the person, force likely to cause great bodily injury. You will see this in a couple of different places. The first element, the defendant did an act, you have heard this one before

“The defendant did an act by its nature would directly and probably result in the application of force to a person. *There is two different acts here, take your pick. The fist right here or the belt.* Now we know the belt was admitted, and you can see the picture. You will actually see, and the defendant admitted you could see the stitch marks from the belt in the picture.

“The force was likely to cause great bodily injury. We know the fist was likely to because it did, but the application of a belted point that it leaves a welt, bruise, call it what you will, but you can still see the stitch marks? Yes.

“The defendant did the act willful. Well, he had to, he either hit her or, you know, knew what he was doing or do it or the belt is exactly the same thing....

“When the defendant acted he was aware of facts that would lead a reasonable person ... to realize that his act by its very nature would directly and probably result in the application of force to somebody. Well, in swinging your fists you know that it is going to – if you’re swinging at them it is going to hit them. You swing the belt, exactly the same analysis.

“Finally, when the defendant acted he had the present ability to apply force likely to produce or cause that great bodily injury. We [have] seen the results, so we know that that element is met.”

In defense counsel's closing argument, he asserted that defendant's trial testimony was consistent and reasonable, that defendant and C.B. argued, C.B. hit defendant, defendant reflexively slapped C.B., they made up, and they had consensual sex. Defendant asserted that to whatever extent C.B. was injured during their mutual fight, her injuries did not constitute great bodily injuries.

B. Analysis

Defendant asserts the court should have given the unanimity instruction as to count VIII, assault by means of force likely to produce great bodily injury, based on the prosecutor's closing argument that the charge could have been based on defendant's act of either punching C.B. in the face or striking her with the belt.

“As a general rule, when violation of a criminal statute is charged and the evidence establishes several acts, any one of which could constitute the crime charged, either the state must select the particular act upon which it relied for the allegation of the information, or the jury must be instructed that it must agree unanimously upon which act to base a verdict of guilty. [Citation.] There are, however, several exceptions to this rule. For example, no unanimity instruction is required if the case falls within the continuous-course-of-conduct exception, which arises ‘when the acts are so closely connected in time as to form part of one transaction’ [citation], or ‘when ... the statute contemplates a continuous course of conduct of a series of acts over a period of time’ [citation]. There also is no need for a unanimity instruction if the defendant offers the same defense or defenses to the various acts constituting the charged crime. [Citation.]” (*People v. Jennings* (2010) 50 Cal.4th 616, 679.)

“ [T]he “continuous course of conduct” exception – when the acts are so closely connected that they form one transaction – is meant to apply not to all crimes occurring during a single transaction but only to those “where the acts testified to are so closely related in time and place that the jurors reasonably must either accept or reject the

victim's testimony in toto.” [Citation.]’ [Citation.]” (*People v. Jenkins* (1994) 29 Cal.App.4th 287, 299; *People v. Bui* (2011) 192 Cal.App.4th 1002, 1011.)

While this scenario has been described as an exception to the requirement for the unanimity instruction, “[i]t would seem more accurate to say that, in this situation, a unanimity instruction is required, but the failure to give one is harmless. [Citation.]” (*People v. Lueth* (2012) 206 Cal.App.4th 189, 196.)

As applied to the instant case, C.B. described a harrowing scene in her bedroom, where defendant surprised her and punched her in the cheek and ear. She fell to the floor, where defendant punched and kicked her. He performed an act of digital penetration and then ordered her onto the bed. When she hesitated, he removed his belt and hit her in the buttocks. When she tried to resist, he threatened to hit her in the face with his belt. He then got onto the bed and raped her. The prosecution introduced photographic evidence of the welt inflicted by the belt, and it was stipulated that C.B.’s physician believed the injury to her ear constituted great bodily injury.

At trial, defendant admitted that he slapped C.B. in the face and hit her with his belt. However, he insisted that she punched him first, and he reflexively hit her back. He also insisted that they reconciled and had consensual sex, and C.B. never said that she was suffering from any pain. In closing argument, defense counsel argued defendant’s account was reasonable, and that C.B. did not suffer great bodily injury.

Based on the specific facts of this case, the court’s failure to give the unanimity instruction was necessarily harmless since the violent assault occurred within an extremely short period of time, in one isolated location, and defendant tendered the same defense to the entirety of the offenses – that they purportedly engaged in mutual combat, C.B. was not injured, and they had consensual sex. (See, e.g., *People v. Robbins* (1989) 209 Cal.App.3d 261, 266.)

II. CALCRIM No. 1190

Defendant next contends the court improperly instructed the jury with CALCRIM No. 1190, as to the testimony of a single witness to prove sexual assault offenses.

Defendant asserts the instruction erroneously reduced the prosecution's burden of proof.

As relevant to defendant's arguments, the court instructed the jury with CALCRIM No. 1190, that "[c]onviction of a sexual assault crime may be based on the testimony of a complaining witness alone." The court also instructed the jury pursuant to CALCRIM No. 301: "The testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence."

Defendant acknowledges that his instructional arguments were rejected in *People v. Gammage* (1992) 2 Cal.4th 693, which addressed the virtually-identical predecessor instructions, and held they were correct statements of the law and did not reduce the prosecution's burden of proof. (*Id.* at p. 700.) Defendant attacks the reasoning in *Gammage's* majority opinion, asserts that the majority opinion is somehow outdated, and urges this court to follow the concurrence in *Gammage*. We decline to do so. We agree with *Gammage* and are bound by its conclusions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

III. Section 654

Defendant next challenges the court's imposition of sentence of the assaultive offenses. Defendant notes that the court stayed imposition of sentence for count VIII, assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)). Defendant now contends the court also should have stayed imposition of the consecutive term for count V, battery causing serious bodily injury (§ 243, subd. (d)); and the concurrent term for the lesser offense for count VII, misdemeanor assault (§ 240).

The People concede the concurrent term for count VII should have been stayed pursuant to section 654. We are thus presented with the question of whether the consecutive determinate term for count V should have also been stayed.

A. The charges and closing argument

In addition to the four sexual offenses, defendant was separately charged with three assaultive offenses: count V, battery causing serious bodily injury (§ 243, subd. (d)); count VII, assault with intent to commit a felony during commission of a first degree burglary (§ 220, subd. (b)), and count VIII, assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)).

In closing argument, as explained *ante*, the prosecutor set forth the factual basis to support the charged offenses. As to count V, battery causing serious bodily injury, the prosecutor argued defendant committed the offense when he “willfully and unlawfully touched [C.B.] in a harmful or offensive manner. She testified to it number one. Two, you have got the picture, the big mark here where the fist hit her right here in front of her ear. You have the stipulation that the parties entered into that there was serious or great bodily injury, and in this case it was the ruptured eardrum The fact that she was struck she says with a fist, the defendant says it was a slap.”

As to count VII, defendant was charged with assault with intent to commit a felony during commission of a first degree burglary. The prosecutor argued the charge was based on defendant’s act of burglarizing C.B.’s apartment with the intent to commit a rape and/or sodomy. Defendant broke into the apartment and performed an act which “by its nature would directly and probably result in the application of force to a person. You got that in a number of places. The digital penetration, that is the application of force for the ... penetration by a foreign object. The two rapes, the sodomy.” The prosecutor argued that defendant “obviously was aware of those facts that he is applying force to her.”

In section I, *ante*, we explained that the prosecutor relied on defendant's acts of punching C.B. in the face, and hitting her with the belt, to support count VIII, assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)).

Defendant was convicted of count V, battery causing serious bodily injury, and count VIII, assault by means of force likely to produce great bodily injury. He was found not guilty of count VI, residential burglary. He was also found not guilty of count VII, assault with intent to commit a felony during commission of a first degree burglary, but guilty of the lesser offense of misdemeanor assault (§ 240).

B. Sentencing

At the sentencing hearing, the court extensively reviewed the charges and possible sentences, and found defendant committed counts I through IV, the unlawful sexual acts, on separate occasions given the breaks between the four sexual acts.

“It seems to the Court that the conduct was certainly an opportunity for [defendant] to reflect. It shows a break in the sexual assault. It shows that there was movement of the victim forced by the defendant. It shows that he never did lose control over her. However, there were violent acts committed in between the sexual assaults. And it shows his significant change in the manner in which the assaults were being committed.”

The court found that counts I through VI, the two rapes, digital penetration, and sodomy, were subject to mandatory consecutive sentencing since defendant committed separate and distinct criminal acts on the same victim, he had a reasonable opportunity between the commission of each sexual assault to reflect on his actions, and resumed the sexual assaultive behavior.

The court then turned to the three assaultive offenses: count V, battery causing serious bodily injury in violation of section 243, subdivision (d); count VIII, assault by means of force likely to produce great bodily injury in violation of section 245, subdivision (a)(1); and the lesser offense for count VII, misdemeanor assault in violation of section 240:

“Counts Five and Seven [sic], which are the [sections] 245 and 243(D)³, it appears to the Court, are, pursuant to Penal Code [section] 654, to each other are not eligible for separate punishment because they involve the same conduct under the same factual scenarios. They’re simply charged in alternative fashion. *However ... [section] 243(D) [count V, battery with serious bodily injury,] is not a [section] 654 application as to the sexual assault. It appears to the Court that the defendant had a separate intent and objective in committing that violent assault. That his intent was—when he entered—was to harass and punish the victim for, one, having another male in the apartment, and for two, not letting him in when he arrived at 3:00 a.m. And that is supported by the jury’s verdict when they found the [residential burglary] allegations not true. It appears they did not believe [defendant] entered the apartment with the intent to commit a rape or sexual assault. And it’s also supported by the finding of the reduction of the sexual assault [in count VII] under [section] 220 during commission of residential burglary to a simple assault under [section] 240. It appears to the Court that the motivating factor of the sexual assault was sexual gratification, which was apparently the purpose of why he went over to the apartment at 3:00 a.m. in the first place. And that he had a separate and distinct intent when he committed those crimes, only after punishing the victim for, one having a male there, and two, not letting him in when he arrived. So it appears to the Court that the [section] 243(D) [in count V] is a separate crime for which a separate punishment is appropriate.” (Italics added.)*

The court imposed the upper term of four years for count V, doubled to eight years because of the second strike. The court stayed the term imposed for count VIII pursuant to section 654, and imposed a concurrent term for count VII.

The prosecutor argued that section 654 did not apply to count V, violation of section 243, subdivision (d) and count VIII, violation of section 245, subdivision (a). The court replied:

“[W]hat I found was that the [sections] 245 and 243 [counts VIII and V] were [section] 654 with each other, but that ... [section] 245 was not

³ The court’s initial words were apparently a misstatement, and it presumably meant to refer to counts V and VIII, violations of section 243, subdivision (d) and section 245, subdivision (a)(1), since the lesser conviction in count VII was for the misdemeanor violation of section 240.

[subject to section] 654. [Section] 654 did not apply to it in terms of the sexual assault. And I did sentence separately on the [section] 243(D). I simply stayed the sentence on the [section] 245 because it appeared to me that the [section] 243(D) and [section] 245 were simply alternative charging of the same incident. They weren't a lesser-included offense, but it prohibited a sentencing of each. But there was a sentence imposed under [section] 243(D) in addition to the sentence imposed on the sexual assault."

C. Analysis

"Section 654 precludes multiple punishment where an act or course of conduct violates more than one criminal statute but a defendant has *only* a single intent and objective. [Citation.] In such circumstances, the court must impose but stay execution of sentence on all of the convictions arising out of the course of conduct except for the offense with the longest sentence. [Citation.]" (*People v. McCoy* (2012) 208 Cal.App.4th 1333, 1338, italics in original.)

"If, however, the defendant had multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. [Citation.]" (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 267-268; *People v. Latimer* (1993) 5 Cal.4th 1203, 1211-1212.) "Whether a course of criminal conduct is a divisible transaction which could be punished under more than one statute within the meaning of section 654 depends on the intent and objective of the actor. [Citation.]" (*People v. Saffle* (1992) 4 Cal.App.4th 434, 438.)

"The determination of whether there was more than one objective is a factual determination, which will not be reversed on appeal unless unsupported by the evidence presented at trial. [Citation.] The factual finding that there was more than one objective must be supported by substantial evidence. [Citation.]" (*People v. Saffle, supra*, 4 Cal.App.4th at p. 438; *People v. Hairston* (2009) 174 Cal.App.4th 231, 240.)

While the court stayed the determinate term imposed for count VIII, assault by means of force likely to produce great bodily injury, and the People now concede the concurrent term for misdemeanor assault (the lesser offense for count VII) also should have been stayed, the question is whether this court should additionally find that the determinate term for count V, battery causing serious bodily injury, must be stayed. Defendant contends that count V should have been stayed because the court found he had the same intent and objective when he committed the battery as when he committed the four sexual offenses.

In *People v. Nubla* (1999) 74 Cal.App.4th 719, the defendant committed several acts of violence against his wife, and the sentencing court imposed multiple sentences for assault and corporal injury on a spouse. *Nubla* held that section 654 did not apply because the offenses were “somewhat analogous to sex offenses in that several similar but separate assaults occurred over a period of time.” (*Id.* at p. 730.) *Nubla* stated that just as “each sexual assault may be viewed as a separately punishable criminal act, notwithstanding that all the offenses arguably were done to obtain sexual gratification,” (*ibid.*) because “ “[n]one of the sex offenses was committed as a means of committing any other, none facilitated commission of any other, and none was incidental” to any other, ” (*id.* at p. 731) the defendant’s separate assaults were not done to facilitate each other and were not incidental to each other. Accordingly, “[t]he trial court was entitled to conclude that each act was separate for purposes of ... section 654.” (*Id.* at p. 731.)

In this case, there is substantial evidence to support the court’s extensive findings that defendant had separate intents and objectives when he committed count V, battery with serious bodily injury, compared to when he committed the four unlawful sexual offenses. C.B. testified that defendant repeatedly demanded to know if she had engaged in sexual relations, presumably with the man who had been in her apartment when defendant arrived. Defendant demanded that C.B. have sex with him and repeatedly beat her when she failed to immediately cooperate. There is overwhelming evidence to

support the trial court's factual finding that defendant committed the battery to harass and punish C.B. for being involved with another man and refusing to let defendant into her apartment at 3:00 a.m., separate and apart from his commission of the four unlawful sexual acts.

DISPOSITION

The judgment is modified to reflect that the concurrent sentence imposed as to count VII, misdemeanor assault in violation of section 240 and is stayed pursuant to section 654. As modified, the judgment is affirmed. The trial court is directed to send a corrected abstract of judgment to the Department of Corrections and Rehabilitation.