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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

GONZALO SALAZAR,

Defendant and Appellant.

G045583

(Super. Ct. No. 10CF1350)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven D. Bromberg, Judge. Affirmed in part; modified in part; and reversed in part.

Cannon & Harris and Gregory L. Cannon, 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, Lilia E. Garcia and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

Gonzalo Salazar was convicted of forcible rape, assault with the intent to commit rape, assault with the intent to commit rape during the commission of a first degree burglary, forcible oral copulation, and aggravated assault. On appeal, Salazar contends his convictions for assault with the intent to commit rape and assault with the intent to commit rape during the commission of a first degree burglary must both be reversed because they are lesser included offenses of forcible rape. Salazar also contends the court abused its discretion by ordering him to have no contact or visitation with the victim. The Attorney General concedes assault with the intent to commit rape is a lesser included offense of assault with the intent to commit rape during the commission of a first degree burglary but argues assault with the intent to commit rape during the commission of a first degree burglary is not a lesser included offense of forcible rape. The Attorney General also concedes the no contact or visitation order cannot stand. We agree with the Attorney General on both counts. Accordingly, we reverse Salazar's conviction for assault with the intent to commit rape and modify the judgment to strike the no contact or visitation order. We affirm the judgment in all other respects.

FACTS AND PROCEDURE

In August 2008, then 15-year-old S.H. was living with relatives including her aunt, several uncles including Salazar, and her cousins, 10-year-old S.G. and 14-year-old R.G. S.H. and S.G. shared a bedroom, and Salazar had the bedroom next door. S.H. had grown up with Salazar and had known him since she was young.

At about 10:00 p.m. on August 14, 2008, S.H. went to bed leaving her cousins watching television in the living room. Other adult relatives were at home when S.H. went to her room, but S.H. did not think Salazar was home.

Sometime after she went to bed, S.H. was sleeping on her side when a man grabbed her shoulders and turned her over onto her back. The man got on top of S.H. and put his hands around her neck. The man was wearing a white tank top, but S.H. could not

see his face. S.H. repeatedly tried to scream and punch the man, but he choked her causing her to lapse in and out of consciousness. The man removed S.H.'s shorts, touched her vaginal area with his mouth, and penetrated her vagina with his penis.

The man ultimately left S.H.'s room through the bedroom window. S.H. went to the living room and called 911. She told the operator she had just been raped by a man wearing a "muscle shirt." Salazar's car was parked in front of the house, but he was not at home.

R.G. testified Salazar was in the house earlier that evening. R.G. saw Salazar go into the bathroom around 9:30 p.m. and when he came out, he asked where S.H. was. Sometime around 10:00 p.m., S.H. came into the living room upset and crying. R.G. looked around for Salazar, but he was gone. R.G. did not see Salazar leave the house.

S.G. testified Salazar was in the house when S.H. went to bed. He was wearing a white muscle shirt that evening. S.G. never saw Salazar leave the house. S.G. testified she once saw Salazar peeking at S.H. through the partially closed door into the girls' bedroom. Another time, she saw him outside looking in through her parents' bedroom window at S.H. lying fully clothed on the bedroom floor watching television. When S.G. asked Salazar what he was doing, he replied he was making sure S.H. was not watching anything inappropriate, and he told S.G. not to tell S.H. or her parents.

Police officers who responded to the 911 call found S.H. was visibly upset and crying. They found a bench at the exterior of the house underneath a window in the bedroom used by S.G.'s parents. The screen on S.H.'s bedroom had been torn or cut, and officers found a red Swiss army knife with a blade extended inside S.H.'s bedroom next to the bed. At approximately 4:20 a.m. the next morning, police found Salazar and another man walking towards the residence. Salazar was wearing a white muscle shirt. When the officer drove toward Salazar and shined his spotlight on him, Salazar put on a red striped shirt and continued to walk away.

The sexual assault response team nurse who examined S.H. testified S.H. had injuries consistent with severe and sustained strangulation (e.g., multiple pinpoint hemorrhages on her face and eyes, bruises under her left eye and right shoulder, and a red, swollen, and tender neck). S.H. experienced pain during the genital examination, and had tenderness, redness, and an abrasion around her vaginal opening. Although no semen was detected in the sexual assault kit taken from S.H., DNA consistent with Salazar was found in swabs taken from seven locations on S.H.'s body during the exam, including the swab from S.H.'s neck and vulva. A penile swab taken from Salazar contained a low quantity of DNA that did not belong to Salazar or S.H. and a low quantity of semen.

Jose Celis testified for the defense. Celis had met Salazar a few nights earlier when Celis was performing at a nightclub in Santa Ana dressed as a woman. Celis told Salazar his name was "Vanessa" and gave Salazar his telephone number. On the night S.H. was attacked, Salazar called Celis around 1:00 a.m. Celis picked up Salazar and took him to Celis's home where they engaged in consensual sexual conduct. Afterwards, Celis gave Salazar a ride home, dropping him off at a gas station near the house.

Verdicts & Sentence

A jury found Salazar guilty of all counts charged in the information including: forcible rape (Pen. Code, § 261, subd. (a)(2))¹ (count one); assault with the intent to commit rape (§ 220, subd. (a)) (count two); assault with the intent to commit rape during the commission of a residential burglary (§ 220, subd. (b)) (count three); forcible oral copulation (§ 288a, subd. (c)(2)) (count four); and aggravated assault (§ 245, subd. (a)(1)) (count five). The jury found true allegations Salazar committed count one during the commission of a residential burglary within the meaning of section 667.61,

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

subdivisions (a) and (d)(1) [mandatory 25-years-to-life term], and he personally inflicted great bodily injury on the victim within the meaning of section 667.61, subdivisions (b) and (e)(3) [mandatory 15-years-to-life term].

The trial court sentenced Salazar to prison for a total term of 46 years to life as follows: consecutive indeterminate terms of 25 years to life on count one—forcible rape (§ 261, subd. (a)(2)) and seven years to life eligibility on count three—assault with the intent to commit rape during the commission of a residential burglary (§ 220, subd. (b)); plus consecutive determinate aggravated terms of six years on count two—assault with the intent to commit rape (§ 220, subd. (a)), and eight years on count four—forcible oral copulation (§ 288a, subd. (c)(2)). The court ordered a section 654 stay on count five—aggravated assault. In addition to ordering restitution fines, fees and assessments, and ordering Salazar to submit to AIDS testing (§ 1202.1), specimen collection (§ 296), and to register as a sex offender (§ 290), the court also ordered that pursuant to section 1202.05, Salazar was to have no visitation with the victim, and no other contact of any kind with her.

DISCUSSION

A. Lesser Included Offenses

Salazar contends assault with the intent to commit rape (§ 220, subd. (a)) (count two), and assault with the intent to commit rape during the commission of a residential burglary (§ 220, subd. (b)) (count three), are lesser included offenses of forcible rape (§ 261, subd. (a)(2)) (count one), and thus his convictions on *both* those counts must be reversed.² The Attorney General concedes count two must be reversed because assault with the intent to commit rape is a lesser included offense of assault with the intent to commit rape during the commission of a residential burglary. However, assault with the intent to commit rape during the commission of a residential burglary is

² The trial court instructed the jury on attempted rape as a lesser included offense of rape and simple assault as a lesser included offense of all three of these counts.

not a lesser included offense of forcible rape, and accordingly both those convictions may be affirmed. We agree with the Attorney General.

Although as a general rule, one may be convicted of more than one crime arising out of the same course of conduct, there is an exception to the rule in the case of necessarily included lesser offenses. (*People v. Reed* (2006) 38 Cal.4th 1224, 1226-1227 (*Reed*)). “An offense is lesser included to a greater offense if the greater offense cannot be committed without also committing the lesser offense. [Citations.]” (*People v. Steele* (2000) 83 Cal.App.4th 212, 217 (*Steele*)). “In deciding whether multiple conviction is proper, a court should consider . . . the statutory elements.” (*Reed, supra*, 38 Cal.4th at p. 1229.) That is to say, “if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former.” (*Id.* at p. 1227.) Put another way, “[t]o constitute a lesser and necessarily included offense it must be of such a nature that as a matter of law and *considered in the abstract* the greater crime cannot be committed without necessarily committing the other offense. [Citations.]’ [Citation.]” (*Steele, supra*, 83 Cal.App.4th at p. 218.)

Section 220 provides: “(a)(1) Except as provided in subdivision (b), any person who assaults another with intent to commit mayhem, rape, sodomy, oral copulation, or any violation of [s]ection 264.1, 288, or 289 shall be punished by imprisonment in the state prison for two, four, or six years. [¶] . . . [¶] (b) Any person who, in the commission of a burglary of the first degree . . . assaults another with intent to commit rape, sodomy, oral copulation, or any violation of [s]ection 264.1, 288, or 289 shall be punished by imprisonment in the state prison for life with the possibility of parole.” In this case, Salazar was charged with and convicted of both assault with the intent to commit rape (§ 220, subd. (a)), and assault with the intent to commit rape during the commission of a residential burglary (§ 220). As both Salazar and the Attorney General contend, because one cannot commit the offense of assault with the intent to commit rape during the commission of a residential burglary without also committing the

offense of assault with the intent to commit rape, the latter is a lesser included offense of the former. (*People v. Dyser* (2012) 202 Cal.App.4th 1015, 1021 (*Dyser*)). Accordingly, Salazar’s conviction on count two must be reversed.

The same is not true for count three. Although Salazar asserts assault with the intent to commit rape during the commission of a residential burglary (§ 220, subd. (b)), is a lesser included offense of forcible rape, he offers no analysis of this point. Rather, he simply relies on a faulty syllogism: assault with the intent to commit rape is a lesser included offense of forcible rape (see e.g., *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477); assault with the intent to commit rape is a lesser included offense of assault with the intent to commit rape during the commission of a residential burglary (*Dyser, supra*, 202 Cal.App.4th at p. 1021); and therefore, assault with the intent to commit rape during the commission of a residential burglary is a lesser included offense of forcible rape. The argument fails for a simple reason—the lesser crime, violation of section 220, subdivision (b), requires a residential burglary; the greater crime, forcible rape (§ 261, subd. (a)(2)), does not. Because the statutory elements of the forcible rape do not include all the statutory elements of assault with the intent to commit rape during the commission of a residential burglary, the latter is not necessarily included in the former. (*Reed, supra*, 38 Cal.4th at p. 1227.)

B. No Contact/Visitation Order

Salazar contends, and the Attorney General agrees, the trial court abused its discretion in ordering no visitation and no contact with S.H. They are correct.

In pronouncing sentence, the trial court ordered Salazar was to have no visitation with S.H. pursuant to section 1202.05, and added it “also orders . . . Salazar, you are to have absolutely no contact with [S.H.]. You are not to write to her, you are not to call her, you are not to [e-mail] her. If, in the event you are ever released from prison . . . you’re to have no contact with her. No contact means no contact. And that can be directed by the Department of Corrections and Parole.” The indeterminate term

abstract of judgment reflects only the order that Salazar have no visitation with S.H. pursuant to section 1202.05.

Section 1202.05 does not permit the no visitation/no contact orders. That section requires the court to prohibit visitation “[w]henver a person is sentenced . . . for violating [s]ection 261 . . . and the victim . . . is a child under the age of 18 years. . . .” (§ 1202.05, subd. (a).) But section 1202.05 applies “only to victims who are under the age of 18 *at the time of the contemplated visitation.*” (*People v. Scott* (2012) 203 Cal.App.4th 1303, 1323 (*Scott*), italics added.) S.H. was 18 years old by the time of trial.

Moreover, while we empathize with the trial court’s assumption that future contact with Salazar would be unwanted by S.H., there is no authority for the broad post-conviction “no contact ever” order orally pronounced by the court. As explained in *Scott, supra*, 203 Cal.App.4th at pages 1324 to 1325, the court may impose such an order under section 136.2 to protect a witness during the pendency of criminal proceedings, under section 1201.3 for a period of up to 10 years to prevent harassment of the victim or her family, or under section 1203.1 as a condition of probation. But none of these sections permit the broad no contact order imposed in this case. And in any event, as observed in *Scott*, “so long as [Salazar] remains incarcerated, all he can do by way of ‘contact’ is send [S.H.] letters and, perhaps, attempt to call her on the telephone. She of course will be free to throw mail away unread, or to hang up. It also appears that correctional authorities reserve the power to block at least some attempts by inmates to communicate with outsiders, generally upon the latters’ request. [Citation.]” (*Scott, supra*, 203 Cal.App.4th at p. 1326, citing Cal. Dept. of Corrections & Rehabilitation Operations Manual.) And if at some point S.H. believes Salazar is directing unwanted communications to her, she has a remedy of obtaining a restraining order under Code of Civil Procedure section 527.6. (*Scott, supra*, 203 Cal.App.4th at p. 1326.)

DISPOSITION

Salazar's conviction on count two (§ 220, subd. (a) [assault with the intent to commit rape]), is reversed and dismissed as a lesser included offenses of count one (§ 261, subd. (a)(2) [forcible rape]), and the sentence thereon is vacated. The judgment is modified to strike the no contact and no visitation orders. In all other respects, the judgment is affirmed. The trial court is directed to prepare an amended determinate abstract of judgment omitting count two, and an amended indeterminate abstract of judgment striking references to no visitation with the victim. The trial court shall forward a certified copy of the amended abstracts of judgment to the California Department of Corrections and Rehabilitation, Division of Adult Operations.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

ARONSON, J.