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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN MANUEL MAZARIEGO,

Defendant and Appellant.

H037216

(Santa Clara County

Super. Ct. No. E1007465)

On the fifth day of jury trial, defendant Juan Manuel Mazariego pleaded no contest to all charges against him, consisting of count 1, kidnapping to commit rape (Pen. Code, § 209, subd. (b)(1)¹); count 2, assault with intent to commit rape (§ 220, subd. (a)); count 3, kidnapping (§ 207, subd. (a)); count 4, assault with force likely to produce great bodily injury (§ 245, subd. (a)(1)); and count 5, false imprisonment (§§ 236, 237).

Defendant was sentenced to a life term for aggravated kidnapping (count 1), consecutive to a determinate upper term of six years for assault with intent to commit rape (count 2), plus one year (one-third the middle term) for assault with force likely to cause great bodily injury (count 4), and a concurrent two-year middle term sentence for false imprisonment (count 5). The court imposed the upper term of eight years for the

¹ All further statutory references are to the Penal Code.

simple kidnapping conviction (count 3), but stayed that sentence pursuant to section 654. Defendant was also ordered to pay fines, fees, and victim restitution not challenged in this appeal.

Defendant argues that section 654 precludes separate punishment for the two assaults and false imprisonment because all of the crimes in this case were part of one indivisible course of conduct with a single objective. Defendant also argues that he cannot be punished separately for false imprisonment because it is a lesser included offense of kidnapping.

We conclude, on the facts here, that sufficient evidence supports separate punishment for kidnapping to commit rape and assault with intent to commit rape based on defendant's opportunity to reflect and renew his intent to rape the victim, but that the sentences for assault with force likely to produce great bodily injury and false imprisonment should be stayed.

FACTS

On January 13, 2010, between 11:00 p.m. and midnight, a 17-year-old girl (Victim), was walking home from a Santa Clara 7-Eleven store past a vegetable stand and large agricultural property known as the "Corn Palace."² There was one streetlight on the nearby Lawrence Expressway, but no lights at the Corn Palace or its parking lot. The surrounding fields were completely dark. Near the Corn Palace, Victim turned right onto Lily Avenue and saw defendant coming toward her from the Corn Palace parking lot. He had pulled his T-shirt over his head, but his face was visible through the neck hole. He was panting like a dog.

² Witnesses referred to the entire property (vegetable stand, parking lot, and fields) as the "Corn Palace." The crimes at issue took place in and near the parking lot associated with the vegetable stand.

Defendant grabbed Victim's arms and she tried to fight him off. They struggled on the ground in a grassy area next to the Lily Avenue sidewalk near a three-foot tall green pole. When Victim called for help, defendant covered her mouth and nose with his hand. Victim scratched and kicked defendant and tried to poke his eyes. As they struggled, she hit her head and face on the green pole.

Victim eventually broke free and ran, but defendant caught up with her, grabbed her shoulders, and dragged her through the Corn Palace parking lot toward the agricultural fields. As Victim continued to struggle, defendant grabbed her by the hair and dragged her, ripping some of her hair out. When Victim screamed, defendant placed his mouth close to her ear and asked her, in a quiet voice, whether she wanted to live.

As they passed a yellow metal railing at the edge of the parking lot, Victim put her foot out against one of the vertical supports to stop her forward motion. Defendant pulled Victim against the vertical support and banged her head on it.

Victim tried to escape by slipping out of her jacket. At first, defendant kept hold of the jacket, but Victim eventually got out of both her jacket and tank top; she was left wearing only a bra from the waist up. Victim turned away but defendant grabbed her again from behind, scratching her upper chest with his nails.

At some point, Victim stopped fighting, thinking that if she complied with defendant, he would not kill her. Victim was lying on the ground and defendant was on his knees, straddling her and pinning her pelvic area. He had one hand over her mouth and reached for his pants with the other; Victim thought he was going to rape her. When a car approached with its headlights on, defendant looked surprised, got up suddenly, and ran off through the fields. Victim returned to the 7-Eleven store and called the police.

Victim's injuries included scrapes on both knees, scratches on her upper chest, a swollen lip, a black eye, bruises on her arm, and bald spots where defendant had ripped her hair out. Several fingernails were torn, and her nail beds were bleeding.

Multiple police officers and crime scene investigators testified at trial. One officer observed that the grassy area near the green pole was “stomped down basically matted down.” The officers found Victim’s cell phone and lighter and defendant’s shoe near the green pole. Starting 8 to 10 feet from the green pole, the officers found a trail of physical evidence in the parking lot including clumps of Victim’s hair, her gold necklace and pendant, and drag marks on the pavement. The trail ended at the yellow railing near the opposite corner of the Corn Palace parking lot. The officers measured the distance between the green pole and the railing as approximately 86 feet. The officers found one of defendant’s shoes near the green pole and his other shoe near the yellow railing, where they also found a wallet and identification card with defendant’s name and address on it; “court paperwork” with defendant’s name on it; a pair of unbuttoned, unzipped jeans; Victim’s jacket; Victim’s tank top; and two men’s socks.

At 2:49 a.m., the officers found defendant asleep in his vehicle, which was parked on Lily Avenue near the Corn Palace. He was wearing a short-sleeved shirt and boxer shorts; he was not wearing pants, socks, or shoes. He had scratches on his face, neck, and both forearms. DNA testing confirmed that defendant was the source of material obtained from under Victim’s fingernails. Defendant’s blood-alcohol content was measured at 0.14 percent at that time.

Defendant was interviewed some eight hours later. Initially, defendant said he was the victim of a robbery and had lost his pants and shoes during the robbery. Defendant later admitted that he had encountered a girl and that he intended to force her to have sex with him.

DISCUSSION

Defendant contends that the sentences on the two assault convictions and the false imprisonment conviction should have been stayed pursuant to section 654 because all of

his crimes were part of an indivisible course of conduct with the sole objective of raping Victim.

General Principles of Section 654

Section 654, subdivision (a), provides: “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.”

Recently the Supreme Court explained in *People v. Mesa* (2012) 54 Cal.4th 191 (*Mesa*): “ ‘Since its origin in 1872, the Penal Code has prohibited multiple punishment for a single “act or omission.” (§ 654.) Although our interpretation of that provision has varied somewhat over the years, we have consistently held that it bars imposing [multiple] sentences for a single act or omission, even though the act or omission may violate more than one provision of the Penal Code. [Citation.] Since 1962 we have interpreted section 654 to allow multiple convictions arising out of a single act or omission, but to bar multiple punishment for those convictions. [Citations.] . . . [E]xecution of the sentence for one of the offenses must be stayed.’ ” (*Mesa, supra*, 54 Cal.4th at p. 195, citing *People v. Latimer* (1993) 5 Cal.4th 1203, 1208 (*Latimer*) and other cases.)

The importance of the facts of a given case to the application of section 654 was emphasized in *People v. Kwok* (1998) 63 Cal.App.4th 1236 (*Kwok*): “The purpose of section 654 is to ensure that a defendant’s punishment is commensurate with his culpability and that he is not punished more than once for what is essentially one criminal act. [Citation.] Courts have devised various rules for proper application of section 654, but ‘[b]ecause of the many differing circumstances wherein criminal conduct involving multiple violations may be deemed to arise out of an “act or omission,” there can be no universal construction which directs the proper application of section 654 in every

instance.’ [Citation.]” (*Kwok, supra*, 63 Cal.App.4th at p. 1252, citing *Latimer, supra*, 5 Cal.4th 1203, 1211 & *People v. Beamon* (1973) 8 Cal.3d 625, 636.)

“Although section 654 literally applies only where multiple statutory violations arise out of a single ‘act or omission,’ it has also long been applied to cases where a ‘course of conduct’ violates several statutes. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19 . . . [(*Neal*), overruled in part on another ground as stated in *People v. Correa* (2012) 54 Cal.4th 331]) A ‘course of conduct’ may be considered a single act within the meaning of section 654 and therefore be punishable only once, or it may constitute a ‘divisible transaction’ which may be punished under more than one statute.” (*Kwok, supra*, 63 Cal.App.4th at p. 1252, citing *Neal, supra*, at p. 19.) An examination of the facts is essential to determining whether multiple convictions are based upon a single act or omission or a divisible course of conduct. (*Mesa, supra*, 54 Cal.4th at p. 196.)

“It is defendant’s intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.] . . . [I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.] [¶] If, on the other hand, defendant harbored ‘multiple criminal objectives,’ which were independent of and not merely incidental to each other, he may be punished for each statutory 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. Harrison* (1989) 48 Cal.3d 321, 335 (*Harrison*).)

“ ‘[M]ultiple crimes are not one transaction where the defendant had a chance to reflect between offenses and each offense created a new risk of harm.’ [Citation.] Under section 654, a course of conduct divisible in time, though directed to one objective, may give rise to multiple convictions and multiple punishment ‘where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and

renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken.’ ” (*People v. Lopez* (2011) 198 Cal.App.4th 698, 717-718 (*Lopez*), quoting *People v. Felix* (2001) 92 Cal.App.4th 905, 915 & *People v. Gaio* (2000) 81 Cal.App.4th 919, 935 (*Gaio*).)

Although the opportunity to reflect test was originally developed in sex crime cases, it has been extended by analogy to other types of crimes.³ In *People v. Trotter* (1992) 7 Cal.App.4th 363, the court applied the opportunity to reflect test in a case such as this where little time passed between the offenses at issue. The defendant in *Trotter*, who had stolen a taxi, fired three shots at a police officer during a chase on the freeway. The defendant fired the second shot about a minute after the first shot and the third shot seconds later. (*Id.* at pp. 365-366.) He was convicted of vehicle theft, evading a peace officer, and three counts of assault with a firearm, and he was sentenced separately on two of the assaults. (*Id.* at p. 365.) The appellate court found no error, reasoning that the defendant’s conduct became more egregious with each successive shot, that each shot required a separate trigger pull, and that all three shots were separated by periods of time during which reflection was possible. Quoting *Harrison, supra*, 48 Cal.3d at page 338, the court stated, “[D]efendant should . . . not be rewarded where, instead of taking advantage of an opportunity to walk away from the victim, he voluntarily resumed his . . . assaultive behavior.’ ” Moreover, “when [the] defendant pauses and, having the option to land another blow or to break off the attack, chooses the former course of action, his culpability increases and his intent, though the same in kind, can be considered separate and distinct under *Harrison*.” (*Trotter, supra*, at pp. 368-369, fn. 4.)

³ See, e.g., *In re William S.* (1989) 208 Cal.App.3d 313, 317 (burglary); *Gaio, supra*, 81 Cal.App.4th at pp. 922-925, 935 (receiving bribes); and *Lopez, supra*, 198 Cal.App.4th at pp. 716-718 (petty theft and use of stolen access card).

Standard of Review

“Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court’s determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence.” (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

The trial court’s determination that the defendant had more than one objective is factual and will be upheld on appeal if supported by substantial evidence. (*People v. Saffle* (1992) 4 Cal.App.4th 434, 438.) Where, as here, the trial court makes no specific finding on the issue, a finding that the crimes were divisible is implicit in the judgment and will be upheld if supported by substantial evidence. (*Lopez, supra*, 198 Cal.App.4th at p. 717.)

We must therefore determine whether substantial evidence supports the trial court’s implied finding that defendant’s convictions for assault with intent to commit rape, assault with force likely to produce great bodily injury, and false imprisonment were separate and divisible from the aggravated kidnapping conviction.

Assault With Intent to Commit Rape

It appears undisputed that the assault with intent to commit rape occurred early in the encounter, when defendant and Victim struggled in the grass near the green pole.

Defendant argues that even though he is “logically more culpable than a criminal who kidnaps a victim without assaulting her, controlling Supreme Court precedent precludes imposing separate sentences for the assaults and the false imprisonment which had no objective independent of the intended rape.” He contends that both the initial assault in the grassy area and the later assault in the parking lot were committed “solely

to subdue a struggling [Victim] so [defendant] could achieve his objective of raping her in the dark field behind the Corn Palace” and that the “assaults were committed to facilitate the intended rape, the same intent underlying the aggravated kidnapping. Therefore, section 654 barred imposing separate punishment for the assaults.”

Defendant relies on *People v. Chacon* (1995) 37 Cal.App.4th 52 (*Chacon*). That case involved two 16-year-old youths (Lopez and Chacon) confined at the California Youth Authority who broke from a group, ran to the library, and punched the librarian in the face. (*Id.* at pp. 56, 58, 64, fn.5.) Lopez dragged the librarian, held a shank to her neck, and threatened to kill her. Chacon demanded a pick-up truck and threatened to kill the librarian if the truck was not delivered. Lopez applied pressure to the librarian’s neck, which caused her to pass out. Chacon stabbed the librarian in the stomach with a shank, then held the shank to her eye and started to count down from 10. After correctional officers supplied a truck, the youths fled with the librarian; Lopez kept his arm around her neck and held the shank to her head. The truck crashed into a tree after traveling a short distance and the youths were apprehended. (*Id.* at pp. 58-59.)

Chacon and Lopez were found guilty of eight felonies: escape by force and violence, five counts involving the librarian (assault with a deadly weapon, aggravated kidnapping for ransom, attempted kidnapping, false imprisonment of a hostage, and false imprisonment), assault with a deadly weapon on another staff member, and extortion of the truck from an officer. (*Chacon, supra*, 37 Cal.App.4th at pp. 56-58.) The defendants were sentenced to life without the possibility of parole on the aggravated kidnapping. (*Id.* at p. 57.) The trial court imposed separate determinate sentences on each of the other seven counts, staying three of those sentences pursuant to section 654. (*Id.* at p. 57.)

On appeal, Chacon and Lopez argued that the sentences on the remaining four counts should also have been stayed under section 654. (*Chacon, supra*, 37 Cal.App.4th at p. 65.) The appellate court agreed in part, concluding that the punishment for extortion, escape by force and violence, and assault on the librarian should have been

stayed. (*Id.* at pp. 66-67.) As to the sentences for extortion and escape, the court reasoned that “kidnap for ransom, extortion, and escape were part of an indivisible transaction having a single objective: escape.” (*Id.* at p. 66.) Citing *People v. Nick* (1985) 164 Cal.App.3d 141, 147 (robbery committed after escape completed) and *People v. Bailey* (1974) 38 Cal.App.3d 693, 701 (separate punishment for kidnapping and escape proper where escape perfected before kidnapping), the court observed in a footnote that separate punishment for those offenses is possible and would have been proper “[h]ad appellants effected the escape before the kidnapping and extortion” (*Id.* at p. 66, fn. 7.) Regarding the assault on the librarian, the court rejected the Attorney General’s contention that it represented gratuitous, unnecessary violence that could be punished separately. (*Id.* at p. 66, citing *People v. Nguyen* (1988) 204 Cal.App.3d 181, 190-191 [separate punishment for shooting store clerk after store robbery completed].) The court held that while the conduct was “atrocious,” the violence was committed to force the officers to supply the truck while the aggravated kidnapping was ongoing. (*Chacon, supra*, at p. 66.) But the court held that separate punishment was permissible for the assault on the other staff member because that offense involved a separate victim. (*Id.* at pp. 66-67.)

This case is distinguishable from *Chacon*. In *Chacon*, the acts of violence against the librarian were part of an indivisible course of conduct aimed at escaping confinement. Here, after defendant assaulted Victim near the green pole, she broke free from him and started to run away. Defendant did not begin dragging Victim across the parking lot until after he caught up with her and grabbed her anew. Thus, the assault to commit rape was completed before the kidnapping started. Since the first assault was charged as an assault to commit rape, the prosecution’s theory was that defendant had formed the intent to rape Victim at the time of the initial assault. But after Victim broke away, defendant had an opportunity to reflect and renew his intent to rape Victim before grabbing her again and dragging her toward the dark fields.

Defendant also relies on *People v. Laster* (1971) 18 Cal.App.3d 381 (*Laster*). The female victim in *Laster* was driving on a highway late at night when she encountered a car “stopped crossways in the road blocking her way.” (*Id.* at p. 385.) Two of the three men in the car approached her and said they were having car trouble. The victim attempted to assist them and the two men got into her car. As she drove them to town to call a tow truck, one of the men (Charles) put her in a chokehold and forced her to stop her car. The other man (Shawgo) stole a dollar from her purse. The third man (Laster) arrived in the car that had previously blocked the road. The victim attempted to escape by running down the road, but Charles caught her. Charles hit her in the face, pushed her into the back seat of her car, struck her again, and removed her clothing. Shawgo drove the victim in her car about four miles and stopped. Charles then dragged the victim to an area off the road, where Laster and Shawgo raped her. (*Id.* at p. 385.)

Laster was convicted of forcible rape, simple kidnapping (§ 207), robbery, and assault with force likely to produce great bodily injury, and the trial court sentenced him separately on each count. (*Laster, supra*, 18 Cal.App.3d at p. 384.) On appeal, Laster argued that section 654 precluded imposing multiple sentences for offenses constituting an indivisible course of conduct. (*Id.* at pp. 384, 393.) The appellate court agreed and stayed the sentences on the kidnapping and assault counts, leaving the sentences for rape and robbery intact. The court observed that the defendant was not a direct actor, but an aider and abettor of the kidnapping, the robbery, and the assault in the car. (*Id.* at pp. 394-395.) The court concluded that all of the defendant’s crimes were “committed within the objective and intent to both rob and rape the victim” and that his “responsibility for the assaults committed by others . . . can only be attributed to an intent to retain control of the victim until the intent to pursue sexual gratification had been satisfied.” (*Id.* at p. 395.)

Defendant’s reliance on *Laster* is misplaced. Defendant was the only perpetrator and a direct actor in all of the offenses committed against Victim; there is no aspect of

aider and abettor liability as in *Laster*. Further, *Laster* did not address whether the events in that case afforded any opportunity to reflect before commencing successive offenses. Here, after Victim initially got away from defendant, he could have chosen to break off the attack. Instead, he chased Victim, grabbed her, and dragged her toward a more secluded area. In the course of the kidnapping, he pulled out clumps of her hair, dragged her on asphalt, scratched her torso, threatened to kill her, and banged her head against a metal rail. The great majority of Victim's injuries occurred after defendant resumed his assaultive behavior, thereby increasing his culpability.

For these reasons, we conclude that substantial evidence supports the trial court's implied finding of divisibility and decision to punish defendant separately for the assault with intent to commit rape.⁴

Assault With Force Likely to Cause Great Bodily Injury & False Imprisonment

Although we conclude that defendant may be punished separately for the assault that occurred near the green pole before the kidnapping, we conclude that once the

⁴ In addition to the reasoning set forth above, we note that assault with intent to commit rape (§ 220) is subject to consecutive, full-term sentencing under section 667.6. (§ 667.6, subds. (c), (e)(9).) The enactment of section 667.6 “created an exception to section 654’s prohibition against multiple punishment for separate acts committed during an indivisible course of conduct.” (*People v. Hicks* (1993) 6 Cal.4th 784, 791, 797 (*Hicks*).) In *Hicks*, the court concluded that section 654 did not bar imposition of a separate, consecutive sentence for a burglary committed incidental to forcible sex offenses that were enumerated in section 667.6, subdivision (e). (*Id.* at p. 797.) In addition, the word “crimes” in section 667.6, subdivision (c) refers to multiple sex or nonsex felonies, not just multiple violations of the offenses enumerated in section 667.6, subdivision (e). (*People v. Jones* (1988) 46 Cal.3d 585, 597.) Consequently, a full consecutive term may be imposed when the defendant is convicted of any offense listed in section 667.6, subdivision (e) and another felony. (*Hicks*, at p. 796, fn. 9, citing *People v. Jones, supra*, at p. 593.) This point was not raised in the parties’ briefs, but it bolsters our conclusion that the court did not err when it imposed a separate sentence on the assault with intent to commit rape conviction.

kidnapping to commit rape commenced, the assaultive conduct and false imprisonment that followed were part of a single course of conduct directed at raping Victim.

Unlike in the first assault, once defendant started dragging Victim through the parking lot toward the fields, there was no break or opportunity to reflect. Moreover, it is not entirely clear which act or acts formed the basis for the second assault conviction. As defendant moved Victim from the grassy area near the green pole to the yellow railing, he engaged in assaultive conduct throughout. In effect, he assaulted Victim while he moved her as part of the kidnapping.

The manner in which defendant confined Victim to the ground leads to the conclusion that the false imprisonment was also part of the intended rape. Victim was lying on the ground and defendant was on his knees, straddling her body and pinning her pelvic area. Although not entirely clear, it is reasonable to infer that this was when he removed his pants, as Victim testified that he reached for his pants while he straddled her, and his pants were found near the yellow railing next to Victim's jacket. Defendant's act of false imprisonment was therefore sexual in nature and supported the conclusion that he intended to rape Victim. There is no evidence to suggest that defendant formed a separate intent or objective to falsely imprison Victim to prevent her from reporting the attack, to torment or degrade her, or to give himself time to escape. (See, e.g., *People v. Saffle*, *supra*, 4 Cal.App.4th at pp. 439-440 [false imprisonment could be punished separately where, after the sex crimes were completed, the defendant formed a separate objective of preventing the victim from reporting the crimes].)

For these reasons, we find insufficient evidence to support the trial court's implied finding of more than one objective after defendant renewed his intent to rape Victim and started dragging her through the Corn Palace parking lot. The sentences on the assault with force likely to produce great bodily injury and the false imprisonment counts must therefore be stayed. In light of this conclusion, we do not reach the issue of separate punishment for false imprisonment as a lesser included offense of kidnapping.

DISPOSITION

The judgment is modified to reflect that the sentences on count 4 (assault with force likely to produce great bodily injury) and count 5 (false imprisonment) are stayed pursuant to section 654. As so modified, the judgment is affirmed. The clerk of the superior court is directed to prepare an amended abstract of judgment reflecting these modifications and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

GROVER, J.*

WE CONCUR:

RUSHING, P.J.

ELIA, J.

*Judge of the Monterey County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.