Filed 5/18/07 P. v. Delgadillo CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LUIS DELGADILLO,

Defendant and Appellant.

F049455 & F049682

(Super. Ct. No. SF012650A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Clarence Westra, Jr., Judge.

Kat Kozik, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and Charles A. French, Deputy Attorneys General, for Plaintiff and Respondent.

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STATEMENT OF THE CASE

On July 14, 2005, the Kern County District Attorney filed an information in superior court charging appellant Jose Luis Delgadillo as follows:

Count I—attempted murder (Pen. Code,[1] §§ 187, subd. (a), 664) with a prior serious felony conviction (§ 667, subd. (a)) and prior strike conviction (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e));

Count II—corporal injury to a cohabitant (§ 273.5, subd. (a)) with a prior strike conviction (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e));

Count III—kidnapping (§ 207, subd. (a)), a serious felony (§ 1192.7, subd. (c)(20)) with a prior serious felony conviction (§ 667, subd. (a)) and prior strike conviction (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e));

Count IV—misdemeanor false imprisonment (§ 236) with a prior strike conviction (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e));

Count V—criminal threats (§ 422) with a prior serious felony conviction (§ 667, subd. (a)) and prior strike conviction (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e));

Count VI—felony obstruction or severance of a telephone line, appurtenance, or apparatus (§ 591) with a prior strike conviction (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e));

Count VII—rape (§ 261, subd. (a)(2)), a serious felony (§ 1192.7, subd. (c)(3)) with a prior felony sex offense (§ 667.61, subd. (d)(1)), commission of the present offense during a kidnapping (§ 667.61, subds. (d)(2), (e)(1)) by a habitual sex offender (§ 667.71) with a prior serious felony conviction (§ 667, subd. (a)) and prior strike conviction (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e)); and

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

Count VIII—failure to register as a sexual offender (§ 290, subd. (g)(2)) with a prior strike conviction (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e)).[2]

On July 22, 2005, appellant was arraigned, pleaded not guilty to the substantive counts, denied the truth of the special allegations, and requested a jury trial.

On September 2, 2005, appellant declined a plea bargain entailing a 21-year term of imprisonment on counts II and III.

On September 8, 2005, counsel stipulated to the severance of count VIII for trial.

On September 12, 2005, the court ruled on numerous motions in limine and jury trial commenced.

On September 15, 2005, appellant waived his right to a jury trial on the truth of the prior convictions and agreed to a court trial of these allegations.

On September 16, 2005, the jury returned verdicts finding appellant guilty of counts II (corporal injury upon cohabitant), IV (false imprisonment), VI (obstruction or severance of telephone line), and VII (misdemeanor battery, § 243), a lesser included offense of that charged in the information. The jury found appellant not guilty of counts I (attempted murder) and V (criminal threats). The jury was unable to reach a verdict on count III (kidnapping) and the court declared a mistrial as to that count.

On September 20, 2005, appellant waived a court trial on the bifurcated special allegations, pleaded guilty to count VIII, and admitted the truth of the strike priors alleged as to counts II, VI, and VIII (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e)).

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[2] Appellant was convicted of a violation of section 262.1 on June 21, 1990, an offense entailing a registration requirement. Appellant registered in 1991 but did not subsequently register in the cities of Shafter or Bakersfield. Appellant lived in the City of Shafter in June 2005. At trial in the instant case, the parties stipulated the factual basis for the failure to register (count VIII) was set forth in the reports of the offense. Appellant notes these offense reports are not part of the record on appeal.

On October 19, 2005, appellant filed a sentencing statement, a request to reduce counts II and VI to misdemeanors, and a request to dismiss the strike prior (§ 1385). On October 26, 2005, respondent filed written opposition to several of appellant's sentencing documents.

On October 28, 2005, the court denied appellant's motions to strike the prior conviction and to reduce count II to a misdemeanor but did grant appellant's motion to reduce count VI to a misdemeanor. The court then denied appellant probation and sentenced him to a total term of nine years four months in state prison. The court imposed the doubled upper term of eight years on count II, a consecutive term of 16 months (one-third of the doubled middle term) on count VIII, and concurrent terms of one year, one year, and six months, respectively, on counts IV, VI, and VII. The court ordered appellant to pay restitution to the victim (§ 1202.4, subd. (f)(2)), imposed a $200 restitution fine (§ 1202.4, subd. (b)), imposed and suspended a second such fine pending successful completion of parole (§ 1202.45), and imposed a $20 court security fee (§ 1465.8). The court awarded 194 days of custody credits.

On November 7, 2005, the court dismissed remaining count III on motion of the district attorney in furtherance of justice (§ 1385).

On December 27, 2005, appellant filed a petition for writ of habeas corpus with this court and raised a number of appellate issues (No. F049455).

On January 23, 2006, this court filed an order construing and treating the petition as a timely-filed notice of appeal and directing the Clerk of the Kern County Superior Court to file the petition as a notice of appeal.

On February 1, 2006, this court filed another copy of appellant's petition for writ and assigned to it case No. F049682.

On March 2, 2006, this court consolidated case Nos. F049455 and F049682 for purposes of hearing and determination.

On February 15, 2007, this court denied appellant's request to file supplemental brief with respect to the ruling in *Cunningham v. California* (2007) 549 U.S. ____ [127 S.Ct. 856] (*Cunningham*). We noted: "In light of the briefing appellant has provided challenging his upper and consecutive terms under *Blakely*, the court does not require additional briefing on the issue at this time."

STATEMENT OF FACTS

In June 2005, appellant and Mary S. were living together as boyfriend and girlfriend in the City of Shafter. Mary S. was still married to one Alberto Reyes, but she considered him her "ex-husband" because they were in the process of separating. At the time of trial, Mary S. and Reyes had called off their divorce.

On Father's Day, June 19, 2005, appellant returned home from work, checked the caller identification feature on their telephones, and discovered that Reyes had called the household. Appellant became upset and talked with Mary S. for an hour about Reyes's calling. Appellant tried to call Reyes that night and the next morning but could not reach him.

On Monday, June 20, 2005, appellant and Mary S. went to Reyes's residence. Reyes came to the door and appellant and Mary S. told him not to call her. When appellant and Mary S. returned home, appellant took the cordless handsets of their two telephones and threw them against the wall, disabling the instruments. Appellant then threatened to kill Mary S., Reyes, and himself. He threatened to kill Mary S. with some pruning shears she had stored by their washing machine. Appellant swore, yelled, and started a fire with some papers in the kitchen sink. Mary S. testified she took his statements seriously, was scared, and did not feel free to leave.

The couple left the house about an hour later. Appellant drove to Reyes's residence and got into a face-to-face shouting match with Reyes. Appellant and Mary S. next drove to the convenience store where appellant worked and appellant borrowed

$100. Mary S. said she was not concerned at this point in their journey. Appellant told her he wanted to take her somewhere, got on a freeway, and drove to Lake Ming.

At Lake Ming, Mary S. stepped out of the passenger door and smoked. Appellant rummaged through the glove box and looked for Reyes's telephone number. Appellant said he had "better not find a phone number of Alberto's or else." Mary S. suggested they sit at a nearby picnic table. Appellant was angry, grabbed her by the shirt and hair, and pulled her back into the car. When she fell onto his lap, appellant punched her in the eye and then smothered her with his hands. Appellant screamed, "Now you want to die, bitch, you're going to die now." Mary S. was scared appellant would carry out his threat. Photos of Mary S. taken after the incident showed a bruise on her right arm and bruising and swelling on her right eye.

Appellant drove away from Lake Ming with Mary S. as his passenger and she was concerned that he would harm her. Appellant angrily locked her door and window and held her seatbelt when they came to stops. He sped and swerved the car and told Mary S. he could drive off of a cliff or smash her head in and kill her. Mary S. tried to calm appellant down by using her pet names for him and reassuring him that she did not love Reyes.

Appellant drove the car to Mojave even though Mary S. did not want to go there. He parked in front of the lobby of the Best Motel, told Mary S. he would watch her, and then went inside to register for a room. The registration took about 10 minutes. Appellant returned to the car, drove to a Taco Bell, and ordered food for both of them in the drive-through lane. They returned to the Best Motel, entered room 111, and ate the food.

Appellant lay on the bed and told Mary S. to lie next to him. She sat on the edge of the bed but said she was not ready to lie down. Appellant suddenly grabbed her, pulled her onto the bed, and straddled her body. She screamed loudly and tried to hit and kick appellant off of her. He responded by stuffing a washcloth in her mouth and

inflicting a “busted” lip. Appellant then placed a pillow over Mary S.’s face and applied all of his weight on it until she started to pass out. Appellant then stopped, pushed her into the bathroom of the motel room, and told her to wash up. Mary S. looked in the mirror and saw blood and bruising.

Appellant next pushed Mary S. on the bed and asked whether she was thinking about her ex-husband. Mary S. thought appellant wanted sex and told him several times she did not want intercourse. Mary S. said she ultimately “play[ed] the part” and gave up resisting because she did not want appellant to hit her. She reclined passively and told appellant she loved him. Appellant penetrated her vagina and ejaculated. Mary S. said the sensation was the same as when they engaged in consensual sex. At one point, appellant expressed interest in anal sex but Mary S. declined and appellant did not pursue the topic further.

After engaging in intercourse, appellant told Mary S. to wash up. He filled the bathtub with water that was too hot for her but she still got in because she did not want to get hit or killed. Appellant washed her and then took a shower himself. Appellant then reclined on the bed and watched a pornographic movie. He tied his leg to Mary S.’s with his belt. Mary S. lay on the bed while appellant watched the movie. Appellant made additional threats to kill Mary S., who was frightened. At one point, he looked at the ceiling and told Mary S. he was looking for a place to hang her.

The couple left the Best Motel between 6:30 a.m. and 7:00 a.m. the next day. Mary S. told appellant she felt ill. She said she was having trouble with her heart and with high blood pressure. She asked appellant to take her to Kern Medical Center (KMC). Appellant agreed to drive her to KMC. Along the way, they stopped at a busy gas station and appellant went inside the store to pay for fuel and beverages. Mary S. did not attempt to flee during their journey between Mojave and KMC because she was afraid appellant would catch her and beat her.

Mary S. said once she entered KMC and was alone with hospital personnel, she told them that appellant had kidnapped, raped, and attempted to kill her. She also said he kept her against her will. However, hospital personnel did not conduct a rape test on her. Mary S. believed they declined to conduct a test because she bathed. A few days after her visit to the hospital, she threw away the clothes she wore during her incident with appellant.

Mary S. spoke to Deputy Sheriff John Abbott at KMC and said she gave him a "full report." Deputy Abbott told her she would have to make a report with the Shafter Police Department. Shafter Police Officer Chris Jackson subsequently interviewed Mary S. on two occasions and spoke with her on several additional occasions. Mary S. told Officer Jackson that appellant forced her into the car, took her to Reyes's home, and then took her to Lake Ming, where he bruised her arm, shoulder, and eye. Mary S. also told Officer Jackson about the pruning shears. She mentioned that appellant looked at the motel room ceiling and said he was seeking to install a hook so he could hang her. Mary S. told Officer Jackson that appellant grabbed her and pulled her back into the car, that he attempted anal sex, and that he made her get into "extremely hot" bath water.

Officer Jackson also conducted a tape-recorded interview with appellant. The prosecution played the taped interview for the jury. The prosecution also lodged a transcript of the recording with the court. Appellant told Officer Jackson he became jealous over Mary S.'s contact with Alberto Reyes. Appellant said he suspected that Reyes had been calling Mary S. prior to Father's Day. Appellant admitted destroying one of their telephones out of jealousy over Reyes.

Appellant said he and Mary S. confronted Reyes twice at the latter's home. Appellant then drove Mary S. to Lake Ming so they could get some "air" and "calm down." He denied taking her to Lake Ming against her will. When they arrived at Lake Ming, Mary S. said she was tired of appellant bringing up the topic of Reyes. Appellant became concerned that she would start to scream, run away, and attract the attention of

law enforcement. Appellant grabbed and stretched Mary S.'s sweater and pulled Mary S. into the car. Appellant said this caused bruises to her arm and eye.

Appellant and Mary S. spent the night in a Mojave motel because the car was acting up. They ate, had sex, and watched television. Appellant said they were "okay" at first. However, he brought up the topic of Reyes again and that caused them to argue. Appellant said Mary S. started screaming. He assumed she was tired of him bringing up the subject of Reyes. Appellant said he did not want Mary S. to attract attention so he put his hand over her mouth. His fingernail nicked her lip and caused it to bleed. Mary S. accused appellant of trying to kill her but he denied it.

The following day, Mary S. complained she was ill and claimed she was having a heart attack. Appellant took her to KMC but suspected she said something about how he had treated her. Appellant said the hospital staff would not tell him whether Mary S. was okay and when she was coming out from treatment. Security people came up and sat in front of him. A deputy sheriff eventually appeared and questioned appellant and then Mary S. The deputy placed appellant under arrest. During their tape-recorded interview, appellant told Officer Jackson, "... I'm really sorry for what happened, you know."

Defense

Tom Lee, manager of the Best Motel in Mojave, testified he was on duty the evening of June 20, 2005. He received no complaints about anything, including screams or loud noises. Lee said appellant and Mary S. were assigned to room 111 during their stay. The telephone in that room was functioning and the ice machine was located just outside the motel office, about 150 to 200 feet from room 111.

Mercedes J. Bloomers, R.N., a supervising nurse at KMC, testified that a female patient can wash away semen by taking a bath or shower. However, that does not eliminate other information that can be gained from administration of a rape kit. Bloomers said it is up to law enforcement to request the administration of a rape kit upon a patient. She testified KMC personnel informed law enforcement about Mary S.'s

allegations but law enforcement did not request a rape kit. Bloomers did not specifically recall Mary S. making an accusation of rape.

Kern County Deputy Sheriff John Abbott said he went to KMC at 9:14 a.m. on June 21, 2005. Mary S. told him there was a struggle in a vehicle and she received minor injuries as a result. Deputy Abbott saw some light bruising on the corner of her right eye and to the inside of her right bicep. Mary S. told him that appellant kidnapped her from Shafter and then took her to Lake Ming and Mojave. She did not tell Abbott that appellant raped her. Abbott could not recall whether Mary S. said that appellant smothered her with a pillow, put a rag in her mouth, bound and gagged her, or threatened to kill her.

Deputy Abbott said he did not ask for a rape examination because Mary S. did not allege rape. He said his investigation was limited to what had occurred at Lake Ming. Deputy Abbott notified the Shafter Police Department and advised them that a further investigation might be needed.

DISCUSSION

On appeal, appellant raises multiple issues, three of which pertain to his count VII conviction of misdemeanor cohabitant battery (§ 243) and the six-month concurrent sentence imposed thereon. Those contentions are: (1) failure to instruct on jury unanimity; (2) conviction of a lesser included offense of which appellant is convicted in count II, and (3) the sentence imposed must be stayed pursuant to section 654. We will find merit to appellant's second contention, reverse the judgment of conviction on count VII, and thus find it unnecessary to address appellant's other contentions as to that count.

Finally, we will address and reject appellant's contentions of sentencing errors pertaining to counts II and VIII.

I.

THE BATTERY CONVICTION IN COUNT VII IS A LESSER INCLUDED OFFENSE OF INFLICTION OF CORPORAL INJURY OF WHICH APPELLANT WAS CONVICTED IN COUNT II

A. The Information, Prosecution Argument, Instructions, and Forms of Verdict

The district attorney alleged in count II of the information:

> "ON OR ABOUT AND BETWEEN JUNE 19, 2005 TO JUNE 21, 2005, JOSE LUIS DELGADILLO, DID WILLFULLY AND UNLAWFULLY INFLICT A CORPORAL INJURY RESULTING IN A TRAUMATIC CONDITION UPON MARY S., WHO WAS A PERSON COHABITATING WITH DEFENDANT, IN VIOLATION OF PENAL CODE SECTION 273.5(A), A FELONY."

The district attorney alleged in count VII of the information:

> "ON OR ABOUT JUNE 20, 2005, JOSE LUIS DELGADILLO, DID WILLFULLY AND UNLAWFULLY HAVE OR ACCOMPLISH AN ACT OF SEXUAL INTERCOURSE WITH A PERSON, TO WIT: MARY S., NOT HIS/HER SPOUSE, AGAINST SAID PERSON'S WILL, BY MEANS OF FORCE, VIOLENCE OR FEAR OF IMMEDIATE OR UNLAWFUL BODILY INJURY ON SAID PERSON OR ANOTHER, IN VIOLATION OF PENAL CODE SECTION 261(A) (2), A FELONY. [¶] IT IS FURTHER ALLEGED THAT THE ABOVE OFFENSE IS A SERIOUS FELONY WITHIN THE MEANING OF PENAL CODE SECTION 1192.7(C) (3)."

At the reported conference on jury instructions, the court proposed to instruct the jury on battery and assault as lesser offenses of that charged in count II. Defense counsel specifically indicated he had no objection to the giving of instructions on those lesser offenses. The court also proposed to instruct the jury in CALJIC No. 3.30 (concurrence of act and general criminal intent) with respect to battery upon a cohabitant, battery, and assault as lesser offenses of the crime of rape charged in count VII. The court invited comments and defense counsel interposed no objection to the proposed instruction.

As to count II, the prosecutor argued to the jury:

"Now the second count is a violation of Penal Code Section 273.5 subdivision A. We commonly refer to this as domestic violence or spousal abuse. It doesn't have to be limited to a married relationship. The law is that cohabitants, and you heard the testimony that these two lived together out on Sycamore in Shafter, California. And in order to prove this, there's two elements that need to be shown. These elements are independent of the two elements that I previously spoke of it the attempted murder.

"First Jose Delgadillo willfully inflicted bodily injury upon a cohabitant, Mary [S.], and bodily injury resulted in traumatic condition. Ladies and gentlemen, he struck her in the face, causing that black eye. And you have photographs. The photographs are in evidence. And the photographs show the injury. And you may look at the photographs and say, well, that's not real bad injuries. They're not life threatening injuries. But under the law a traumatic condition, which is what is required, is a condition of the body, such as a wound or external or internal injury, whether of a minor or serious nature, caused by physical force.

"[Mary S.] told you of injuries she sustained to her shoulder as a result of his attack, she told you of injuries sustained to her eye as a result of his attack. Those occurred at Lake Ming. She also talked about injuries that she sustained on her arm, also occurring at Lake Ming. And then we have additional injuries. The injury that occurred while she was in the motel room when he shoved the rag in her mouth, when he split her lip open and she bled and she had to, she had to go to the bathroom and clean herself up. Those are all injuries that are traumatic conditions. Like I said, the law says, not me, the law says the injuries can be minor or serious. That's the second count. Did this person, Jose Delgadillo, who was living with Mary [S.] as a cohabitant in a romantic, intimate relationship, did he inflict bodily injury resulting in traumatic condition? There's no doubt about it, he certainly did."

As to count VII, the prosecutor argued to the jury:

"… Count seven is the rape. Oftentimes when we see rape in a movie or on television it is a stranger and it's violent and clothes are torn and knives are at throats, and it is very dramatic. [¶] Ladies and gentlemen, this isn't television. This isn't scripted. It is not designed to wind up in a nice, tidy package at the end of an hour or two hours. This is real life. And sometimes in real life people that know each other, people that have an intimate relationship with each other can be involved in a rape, and that's what we have here, ladies and gentlemen. And it is not my opinion that this

can happen. The law says that this can happen. And that's what's important here. The law says that this can happen.

"What are the elements to the charge of rape as alleged in count seven of the Information? Well, the first element is that a male and female engaged in an act of sexual intercourse. There's no dispute that sex was had. There's no dispute that the participants in the sexual intercourse at the Best Motel in Mojave, California, were Jose Delgadillo and Mary [S.]. And it's not disputed that before that they had had a sexual relationship. None of that is in dispute.

"Second element, the two persons were not married to each other at the time of the act of sexual intercourse. They lived together. They were boyfriend and girlfriend. But they were not married to each other.

"Three, the act of the intercourse was against the will of the alleged victim. Well, the alleged victim, that's Mary [S.], and she told you that she said, no, I don't want to have sex with you at least three times, but he ignored her.

"Why should we believe Mary [S.] told him I don't want to have sex with you? Well, let's think about the events that led up to this. Okay. They get in the fight in the morning because of his jealousy. He forces her to go over to her ex-husband's house. They leave the ex-husband's house, they drive to AM/PM. Then he drives her to Lake Ming. At that point she wants to get away and tries to walk away from the car, and he won't let her. He grabs her and yanks her back in, punches her in the face, and locks her in the car and drives all the while threatening her, threatening to kill her.

"When they get to Mojave, he checks into a room, but before he leaves the car he tells her, I can see you—parks right in front of the windows—I can see you, I'll be watching you, and she testified, Mary [S.] testified, in fact, he did watch her through the window. Then he makes her go into this hotel room out in Mojave and while in there he suddenly says, after doing all of these violent acts towards her, it's time to have sex. Not exactly foreplay, ladies and gentlemen, not exactly romantic.

"The only reason she was even in that motel room is because he had forced her to go there. He had kidnapped her, pulled her back into that car, driven there, threatening her, threatening her with death, threatening that he would kill her and leave her body and no one would ever find it.

"At some point she couldn't fight anymore, and that's when he decided to do what he wanted to do. Not what she wanted to do, what he wanted to do.

"Final ingredient, the final element, the act was accomplished by means of force, violence, duress, menace, or fear of immediate and unlawfully bodily injury to Mary [S.]. I just covered that, ladies and gentlemen. The only reason she's even in that motel room is because of his violence. The only reason she's in that hotel room is because of his menace, his threats. He's already tried to kill her. He already shoved a rag in her mouth, put a pillow over her heard. He's already done all of those things by the time he decides he now wants to have sex.

"Ladies and gentlemen, that is violence, that is force, that is duress, that is menace, that is fear of immediate and unlawfully bodily injury."

Among many other instructions, the court gave the jury CALJIC No. 3.30, which stated:

"And in the crimes charged in counts two, three, and seven, namely, spousal abuse, kidnapping, and rape, and the crimes of battery upon a co-inhabitant, battery, and assault, which are lesser crimes, there must exist a union or joint operation of act, conduct, and general criminal intent.

"General criminal intent does not require an intent to violate the law for when a person intentionally does that which the law declares to be a crime, he is acting with general criminal intent even though he may not know that his act or conduct is unlawful."

The court also gave CALJIC No. 17.12 (jury may return partial verdict—non-homicide—express acquittal—first), which stated:

"Now if you are not satisfied beyond a reasonable doubt that the defendant is guilty of a crime of which he is accused and you unanimously so find, you may convict him of any lesser crime provided you are satisfied beyond a reasonable doubt that he is guilty of the lesser crime.

"You will be provided with guilty and not guilty verdict forms for the crimes charged and lesser crimes thereto.

"Thus you are to determine whether the defendant is guilty or not guilty of the crimes charged or of any lesser crimes. And in doing so you have

discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it.

"You may find it to be productive to consider and reach tentative conclusions on all charges and lesser crimes before reaching a final verdict.

"Before you return any final or formal verdict, you must be guided by the following: If you unanimously find the defendant guilty of the crime for which he is accused, your foreperson should sign and date the corresponding verdict form. All other verdict forms must be left unsigned.

"If you are unable to reach a unanimous verdict as to the crime of which the defendant is accused, do not sign any verdict forms and report your disagreement to the Court. The Court cannot accept a guilty verdict on a lesser crime unless the jury also unanimously finds and returns a signed verdict form of not guilty as to the charged or greater crime.

"If you . . . unanimously agree and find defendant not guilty of the crime for which he is charged and cannot reach a unanimous agreement as to the lesser crime, your foreperson should sign and date the not guilty verdict form as to the charged or greater crime and report your disagreement as to the lesser crime to the Court."

As to count II, the court subsequently provided the jury with forms of verdict for the substantive crime charged as well as the lesser included offenses of misdemeanor battery upon a cohabitant (§ 243, subd. (e)(1)), misdemeanor battery (§ 243), and misdemeanor assault (§ 240). As to count VII, the court subsequently provided the jury with forms of verdict for the substantive crime charged (rape by force) as well as the "lesser but necessarily included offense[s]" of misdemeanor battery (§ 243) and misdemeanor assault (§ 240).

B. <u>Verdicts and Argument on Appeal</u>

As to count II, the jury rendered a guilty verdict of felony infliction of corporal injury upon a cohabitant. As to count VII, the jury rendered a not guilty verdict on the charged offense of rape by force and instead rendered a guilty verdict on the lesser included offense of misdemeanor battery (§ 243).

Appellant now argues:

"A defendant cannot be convicted of both a greater including and a lesser included offense if both are based on the same conduct. (*People v. Ortega* [(1998)] 19 Cal.4[th] 686, 699 [where defendant is convicted of both robbery and the lesser included crime of theft based on the same conduct, theft conviction cannot stand.]) Here, the State relied on virtually the same acts to prove both count two and seven. The prosecutor contended that appellant committed count two by inflicting the bruises and eye injury on [Mary S.] at Lake Ming and giving her a split lip due to gagging her at the motel. As noted, in regards to count seven, the jury was given the option of convicting appellant of battery as a lesser offense to the charge of rape. The prosecutor's argument did not address battery *per se* but instead focused on the greater crime of rape. It asserted that appellant committed the non-consensual sexual intercourse as a result of his use of force and violence against [Mary S.], i.e., inflicting the bruises and eye injury at Lake Ming, kidnapping her, giving her a split lip due to gagging her at the motel, and putting the pillow over her head until she nearly blacked out at the motel.

"Thus, the prosecutor relied on the same acts to prove both counts two and seven, except (1) he argued that count seven was also committed via use of the pillow and (2) by virtue [of] the kidnapping reference, possibly suggested it was committed by appellant's holding on to [Mary S.]'s seat belt. Notably, the prosecutor did not present either additional act as a distinct basis for the battery conviction, and it is evident from the verdicts that the count seven conviction was not based on them. The prosecutor heavily relied on the pillow use to prove count one, attempted murder, but the jury acquitted appellant of this offense and of the lesser crime of attempted manslaughter. Further, the jury hung on the charge of kidnapping in count three, to which the seatbelt holding related.

"Because counts two and seven constitute greater including and lesser included offenses based on the same facts, count seven must be reversed."

C. Governing Law

A defendant may be charged in a single pleading with two or more different offenses connected together in their commission. The prosecution need not elect between those offenses. The defendant may be convicted of any number of the offenses charged. (§ 954.) This permits the charging of the same offense on alternative legal theories so that a prosecutor in doubt need not decide at the outset what particular offense can be proved by evidence not yet presented. (*People v. Ryan* (2006) 138 Cal.App.4th 360,

368.) As a result, a person may be convicted of, although not punished for, more than one crime arising out of the same act or course of conduct. In California, a single act or course of conduct by a defendant can lead to convictions of any number of the offenses charged. Section 954 generally permits multiple convictions. Section 654 is its statutory counterpart and prohibits multiple punishment for the same act or omission. When section 954 permits multiple conviction but section 654 prohibits multiple punishment, the trial court must stay execution of sentence on the convictions for which multiple punishment is prohibited. (*People v. Reed* (2006) 38 Cal.4th 1224, 1226-1227.)

A judicially created exception to the general rule permitting multiple convictions prohibits multiple convictions based on necessarily included offenses. If a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former. A defendant may be convicted of an uncharged crime if, but only if, the uncharged crime is necessarily included in the charged crime. The reason for this rule rests on constitutional grounds. Due process of law requires that an accused be advised of the charges so that he or she may have a reasonable opportunity to prepare and present a defense. The required notice is provided as to any charged offense and any lesser offense necessarily committed when the charged offense is committed. (*People v. Reed*, *supra*, 38 Cal.4th at p. 1227.)

California courts have applied two tests in determining whether an uncharged offense is necessarily included within a charged offense: the elements test and the accusatory pleading test. Under the elements test, 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. Under the accusatory pleading test, if the facts alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former. Only a statutorily lesser included offense is subject to the bar against multiple convictions in the same proceeding. An offense that may be a

lesser included offense because of the specific nature of the accusatory pleading is not subject to the same bar. (*People v. Reed, supra*, 38 Cal.4th at pp. 1227-1231.)

Section 273.5, subdivision (a), as charged in count II, is a battery offense. The offense is a general intent crime that entails a use of force resulting in an injury. (*People v. Thurston* (1999) 71 Cal.App.4th 1050, 1053-1055.) Section 261, subdivision (a)(2), as charged in count VII, is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator against the person's will by means of force or violence and is also a general intent crime. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1130; *People v. Griffin* (2004) 33 Cal.4th 1015, 1022.) In the instant appeal, respondent does not (a) draw a distinction between the elements test and the accusatory pleading test; (b) expressly apply either test to the facts of the instant case; or (c) dispute the notion that misdemeanor battery (§ 243, subd. (e)(1)) is a lesser included offense of the offenses charged in counts II and VII.

Rather, respondent initially contends the reasonable inference is that "in finding appellant guilty of section 243, subdivision (e)(1), the jury necessarily believed that appellant committed a battery when he either shoved a rag in Mary S.'s mouth, or when he put the pillow over her face." In other words, respondent first maintains that the jury looked only to acts of battery at the Best Motel when rendering their verdict on count VII. Respondent then goes on to offer an alternative argument. In that latter argument, respondent acknowledges that battery (§ 243, subd. (e)(1))[3] is a lesser included offense of

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[3] Section 243 focuses on the actual injury inflicted and not on the force used. (*People v. Mansfield* (1988) 200 Cal.App.3d 82, 88.) Moreover, section 243 addresses the result of conduct rather than proscribing specific conduct. (*People v. Bertoldo* (1978) 77 Cal.App.3d 627, 633.) Section 243 does not include a definition of the term "battery." As defined in section 242, battery is "any willful and unlawful use of force or violence upon the person of another." Force against the person is enough. Such force need not be violent or severe, need not cause bodily harm or even pain, and need not leave any mark. (*People v. Longoria* (1995) 34 Cal.App.4th 12, 16.) The least unprivileged touching

section 273.5 and further acknowledges that the prosecutor cited the same acts to establish battery of a cohabitant with respect to both count II and count VII. Respondent then concludes that "assuming the jury found appellant guilty of violating section 273.5 in count II based on the same acts constituting battery of a cohabitant in count VII, then the conviction in count VII can not stand."

Respondent's alternate conclusion is well-taken. From the instant record we cannot determine the precise factual basis for the verdict in count VII. The jury may very well have used appellant's conduct at Lake Ming to render a verdict of guilt on count II and appellant's conduct at the Best Motel to render a verdict of guilt of misdemeanor battery, a lesser offense of that charged in count VII. However, there is no way of knowing this and it is equally likely the jury used appellant's conduct at Lake Ming (or all or any other part of appellant's conduct) to render the verdicts on both counts II and VII. Under these circumstances, reversal of the judgment of conviction and sentence on count VII is required. (*People v. Castaneda* (1997) 55 Cal.App.4th 1067, 1071.)

II.

IMPOSITION OF AN UPPER TERM ON COUNT II AND A CONSECUTIVE TERM ON COUNT VIII

Appellant contends that imposition of the upper term on count II and a consecutive term on count VIII violated his rights to due process and trial by jury because such terms were not based on facts found by a jury beyond a reasonable doubt.

A. The Sentencing Hearing

On October 28, 2005, the court conducted a sentencing hearing and considered various motions and pleadings filed by respective counsel. These included a defense

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may constitute a criminal battery. (*County of Santa Clara v. Willis* (1986) 179 Cal.App.3d 1240, 1251, fn. 6.)

request to strike appellant's prior strike conviction for purposes of sentencing (§ 1385) and a request to reduce counts II and VI to misdemeanors.

After hearing the arguments of counsel, the court ultimately ruled:

> "… First of all, in terms of the motions that have been filed, the request of the Court to consider Romero principles as it might relate to the strike prior, which is found to be true, the Court has reviewed the record of Mr. Delgadillo. The strike prior is a conviction of Penal Code Section 261.2, which occurred in 1990. Apparently he was discharged from parole in 1994.
>
> "The Court considers the nature of that offense, crime of which 261.2 is, in the Court's estimation, a very serious crime, one which, of course, is one that carries with it the concern of the criminal justice system and the law, the laws of the State of California, that person who commits such a crime is a person who's considered to be extremely -- well, considered to be one given the Evidence Code Sections that allow that evidence to be used in subsequent prosecutions on the theory that prior conduct of that nature is highly probative of proving substantive conduct. The Court's of the considered opinion that legislative recognition of that principle specifically related to sexual crimes does reflect the ... legislature's concern that there is propensity aspects to previous conduct that relate to future conduct.
>
> "And therefore, the Court does consider that as ... a basis for considering a prior conviction of such offense as being one that makes that prior conviction a very serious conviction and one which is not one which is lightly considered for sentencing purposes in the future.
>
> "His record other than that conviction between that time and the present time is de minimis, and that's recognized by the Court, basically a driving under the influence offense in 2003 and driving without a license in 1994.
>
> "The present events as reflected in the evidence, and certainly as reflected in the conviction of the Penal Code Section 273.5 offense does again reflect conduct by the defendant that reflects violence toward person of the opposite sex. And the Court is of the concern that Mr. Delgadillo's previous conviction and the conviction for the current offense is of a nature that reflects a continuing perspective about his relationships with persons of the opposite sex that make the Court extremely reticent to strike the previous conviction on the basis of Romero principles in that it is determined by the Court that he continues to be a person who's willing to

engage in inappropriate conduct directed toward the person of the opposite sex, which is conduct that is violent or potentially violent, and therefore, that is heavily weighted factor in determining whether to strike that previous conviction.

"The Court's of the considered opinion that his failure to register under Penal Code Section 290 again reflects on his, in effect, lack of willingness to comport his conduct and his life-style to the requirements of the law, that is to continue to register because of the requirements of Penal Code Section 290, and so the Court does consider that, as well as conviction in this case of a serious disregard for his responsibilities arising out of the first conviction that ... causes the Court again to think that he is a person who is not willing to comport his requirements under the law with those requirements as the law abiding citizen to keep in contact with law enforcement given that mandate under the law.

"So under the circumstances, the Court cannot conclude that he is a person who has at this point in his life become a person whose life and events and his interaction with other people is such that it is outside the purposes of the intents of the Romero case and line of cases, and therefore, the Court does not intend to strike the 667 E prior allegation, which is one that's been proved in the course of this litigation.

"As to the motion to reduce count two to a misdemeanor, I incorporate the comments I have heretofore made, and given his history of violent conduct toward person of the opposite sex on previous occasion and conviction for that offense, the events and circumstances surrounding his conviction on this charge are doubly meaningful and again reflects continuing outlook by him upon persons of the opposite sex which is of the serious concern to the Court, and therefore, I do deny the motion to denominate count two as a misdemeanor.

"As to count six, the Court's of the considered opinion that the offense as alleged, if I understand and recall correctly ... the throwing of a ... [¶]…[¶] [c]ordless phone ... and disabling of that phone. The Court's of the considered opinion that the changing technology of our society which reflects communication through cordless and/or ... cell phones, that the statute which was passed some period ago had to do with phone lines, land lines which reflected different technology underlying the passage of that crime, that whereas case law has said that this particular charge would fall within that statute, nevertheless, the Court's of the considered opinion this offense is one that's a relatively minor nature, and therefore, the Court will grant the motion as to count six and denominate count six as a

misdemeanor and will so order punishment within the parameters of the misdemeanor conviction as to count six."

The court went on to impose sentence:

"The Court having considered those requests of counsel does make the following orders: Probation is denied for the reason the offense herein reflected is offense of such serious nature that the conviction for the offense in count two is to the degree and extent seriousness that grant of probation would be the inappropriate response, and therefore, probation is denied.

"He is sentenced to the Department of Corrections as to count two for the upper term, which is doubled, pursuant to Section 667 E for the upper term of eight years.

"It is further ordered that he provide and comply with Section 296 of the Penal Code and provide blood and saliva samples for DNA testing, thumbprint and palmprint impressions of each hand pursuant to that section.

"It is further ordered as to count eight, the Court likewise denying the application of Section 17 principles of count eight, probation is denied, he is sentenced to the Department of Corrections for the mid-term, which is doubled pursuant to Section 667 E and orders that all but one third of that be served consecutive to the term imposed in count two, for a period of 16 months.

"And the Court does order that that, as indicated, be served consecutive, for a total fixed term of nine years eight months. The Court does order that restitution in the amount of $94.92 be paid pursuant to Penal Code Section 1202.4 F in an amount to be determined and an additional amount to be determined by the Probation Department at the direction of the Court to [Mary S.] for medical expenses and related losses.

"Also ordered the defendant pay restitution in an amount to be determined by the Probation Department at the direction of the Court and payable to restitution fund pursuant to Penal Code Section 1202.4 F 2, for victim compensation and government claims boards reimbursement to the victim.

"Further ordered that Mr. Delgadillo pay the sums of 20, 200, and $200 respectively under Penal Code Sections 1465.8, 1202.4 B, and 1202.45, the Court entering an order suspending that last amount subject to any parole revocation proceedings that might be initiated by the Department of Corrections.

"It is also ordered that as to count four, probation be denied. The defendant is sentenced to the Kern County jail for a period of one year. That sentence is ordered to be served concurrent with those sentences imposed as to count two.

"And as to count six, the defendant is sentenced to the term of one year. And that term is to be served concurrent with the sentences previously imposed as to count two.

"And as to count seven, probation is denied, he is sentenced to the Kern County jail for a period of six months. That sentence is ordered to be served concurrent with the sentence imposed in count two."

B. Appellant's Contention

Appellant contends:

"The trial court imposed the upper term for count two, infliction of corporal injury, and decided to run the terms for count eight, failure to register as a sex offender, consecutively to it. The trial court did not explicitly articulate reasons for these two sentencing choices. To the extent that it gave reasons, it did so in connection with ruling on appellant's motions to strike his prior strike conviction and to reduce certain counts to misdemeanors. The trial court stated that (1) appellant had a prior conviction for the 'very serious' crime of rape; (2) the nature of appellant's prior conviction and the circumstances of the present offenses demonstrate appellant's willingness to abuse women; and (3) appellant's current conviction for failure to register as a sex offender demonstrates his unwillingness to abide by the law.

"These factual findings were made by the trial court under the preponderance of the evidence standard, not by the jury beyond a reasonable doubt. This violated appellant's Sixth Amendment right to trial by jury and Fifth and Fourteenth Amendment right to proof beyond a reasonable doubt under *Apprendi v. New Jersey* (2000) 530 U.S. 466 ... and *Blakely v. Washington* (2004) 542 U.S. 296 . . .."

We address appellant's contentions in turn.

C. Reasons for Upper Term

A sentencing court is required to provide a statement of reasons on the record for selecting and imposing the upper term. (§ 1170, subd. (b); Cal. Rules of Court, rule 4.406(b).) The trial court overlooked this requirement when sentencing appellant on

October 28, 2005. However, appellant cannot challenge the error directly because counsel failed to object on this basis at sentencing. (*People v. Tillman* (2000) 22 Cal.4th 300, 302-303 [failure of sentencing court to make findings required by statute is waived if party fails to bring error to sentencing court's attention]; *People v. Scott* (1994) 9 Cal.4th 331, 348 [defects in the trial court's statement of reasons at sentencing are waived unless challenged at the time of sentencing].)

D. *Apprendi/Blakely/Cunningham* Error in the Imposition of an Upper Term of Imprisonment

Appellant contends the trial court erroneously imposed an upper term of imprisonment on count II because it was based on "factual findings ... made by the trial court under the preponderance of the evidence standard, not by the jury beyond a reasonable doubt."

In *Blakely v. Washington* (2004) 542 U.S. 296, the United States Supreme Court reaffirmed the rule announced in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*): "'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Blakely*, *supra*, 542 U.S. at p. 301, quoting *Apprendi*, *supra*, 530 U.S. at p. 490.) One year later, the United States Supreme Court reiterated the right to a jury trial requires that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (*United States v. Booker* (2005) 543 U.S. 220, 244.)

In *People v. Black* (2005) 35 Cal.4th 1238 (*Black*), the California Supreme Court considered the effect of *Apprendi* and *Blakely* on this state's Determinate Sentencing Law and held that the imposition of upper terms does not constitute an increase in the penalty for a crime beyond the statutory maximum, and therefore "the judicial factfinding

that occurs when a judge exercises discretion to impose an upper term sentence ... does not implicate a defendant's Sixth Amendment rights to a jury trial." (*Black, supra,* 35 Cal.4th at p. 1244.)

In *Cunningham, supra,* 549 U.S. ___ [127 S.Ct. 856], the court held California's Determinate Sentencing Law violates a defendant's Sixth and Fourteenth Amendment rights to a jury trial to the extent it permits a trial court to impose an upper term based on facts—other than the fact of a prior conviction—found by the court rather than by a jury beyond a reasonable doubt.

> "As this Court's decisions instruct, the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant. *Apprendi v. New Jersey*, 530 U.S. 466 … (2000); *Ring v. Arizona*, 536 U.S. 584 … (2002); *Blakely v. Washington*, 542 U.S. 296 … (2004); *United States v. Booker*, 543 U.S. 220 … (2005). '[T]he relevant "statutory maximum,"' this Court has clarified, 'is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.' *Blakely*, 542 U.S., at 303-304 … (emphasis in original).... [¶] ... [¶]
>
> "… Contrary to the *Black* court's holding, our decisions from *Apprendi* to *Booker* point to the middle term specified in California's statutes, not the upper term, as the relevant statutory maximum. Because the DSL [Determinate Sentencing Law] authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent." (*Cunningham, supra,* 127 S.Ct. at pp. 860, 871, fn. omitted.)

Under California law, it is settled that only a single aggravating factor is required to impose the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728; *People v. Earley* (2004) 122 Cal.App.4th 542, 550.) As appellant points out, the trial court did not explicitly articulate reasons for its sentencing choices as it imposed sentence. To the extent the court gave reasons, it did so in connection with ruling on appellant's motion to strike his prior strike conviction and to reduce certain counts to misdemeanors. As noted

above, these rulings occurred immediately prior to the imposition of sentence. In rendering those rulings on appellant's motion, the court stated that (1) appellant had a prior conviction for the "very serious" crime of rape; (2) the nature of appellant's prior conviction and the circumstances of the present offenses demonstrated appellant's willingness to abuse women; and (3) appellant's current conviction for failure to register as a sex offender demonstrates his unwillingness to abide by the law. The trial court's conclusions were clearly predicated on jury findings made upon proof beyond a reasonable doubt. To paraphrase *Apprendi,* the facts increasing the penalty for appellant's crime beyond a prescribed statutory maximum had been submitted to a jury and proved beyond a reasonable doubt. (*Apprendi, supra*, 530 U.S. at p. 490.)

The trial court imposed an upper term based on judicially-found facts deemed constitutionally permissible under *Apprendi, Blakely,* and *Cunningham*. Resentencing is not required on count II.

E. *Apprendi/Blakely/Cunningham* Error in the Imposition of Consecutive Terms of Imprisonment

Appellant further contends the trial court erroneously imposed a consecutive term on count VIII because it was not based upon facts found by a jury beyond a reasonable doubt.

In *Black, supra*, 35 Cal.4th 1238, the California Supreme Court held that "a jury trial is not required on the aggravating factors that justify imposition of consecutive sentences." (*Id.* at p. 1262.) That holding was not overturned by *Cunningham*, which did not address the distinct issue of imposition of consecutive sentencing for separate crimes. Our Supreme Court has held that a judge's imposition of consecutive sentencing does not impermissibly increase the penalty for a crime beyond the prescribed statutory maximum. (*Id.* at pp. 1262-1264; accord *State v. Kahapea* (Hawaii 2006) 141 P.3d 440, 451-453 [collecting cases].) Our Supreme Court's holding is binding on this court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

The trial court's imposition of a consecutive term on count VIII did not violate appellant's rights to a jury trial and due process of law.

DISPOSITION

The judgment of conviction and sentence on count VII is reversed. In all other respects the judgment is affirmed. The superior court is directed to amend its records and transmit copies of the amended record to all appropriate parties and entities.

_____
HARRIS, Acting P.J.

WE CONCUR:

_____
WISEMAN, J.

_____
KANE, J.