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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CECIL TOWNSEND, JR., Defendant and Appellant.	B186647 (Los Angeles County Super. Ct. No. BA250166)

APPEAL from a judgment of the Superior Court of Los Angeles County. Larry P. Fidler, Judge. Affirmed as modified and remanded.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Mary Sanchez and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Cecil Townsend, Jr., appeals from the judgment entered upon his convictions by jury of five counts of oral copulation (Pen.Code, § 288a, subd. (c)(2), counts 1, 4, 5, 9 & 13),[1] four counts of forcible rape (§ 261, subd. (a)(2), counts 2, 6, 10 & 14), two counts of robbery (§ 211, counts 11 & 15), two counts of false imprisonment (§ 236, counts 8 & 16), as lesser included offenses of kidnapping (§ 209, subd. (b)(1)), and one count each of attempted second degree robbery (§§ 664/211, count 7) and assault with a deadly weapon (§ 245, subd. (a)(1), count 12).[2] The jury also found to be true in connection with each of the sex offenses, the allegation that appellant personally used a dangerous or deadly weapon or firearm in the commission of the offense within the meaning of section 667.61, subdivision (e)(4), in connection with counts 1, 2, 5, 6, 9, 10, 13, and 14, the allegation that the offense was committed against multiple victims within the meaning of section 667.61, subdivision (e)(5), and, with regard to counts 7, 11 and 15, the allegation that appellant personally used a deadly or dangerous weapon within the meaning of section 12022, subdivision (b)(1). The trial court sentenced appellant to an aggregate state prison term of 222 years four months to life. Appellant contends that (1) there was insufficient evidence of force to support the rape and oral copulation convictions, (2) the trial court erred in imposing 25-years-to-life sentences with respect to counts 1, 2, 5, 6, 9, 10, 13, and 14 because the jury found only one sentencing circumstance under section 667.61, subdivision (e), (3) the trial court erred in imposing a 15-years-to-life sentence with respect to count 4 because the jury found no sentencing circumstances under section 667.61, subdivision (e), (4) the trial court erred in imposing multiple life terms on sex offenses involving the same victims during the same occasion at a single location, and (5) imposition of consecutive sentences violated appellant's constitutional rights under the Sixth and

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

[2] Appellant was acquitted of burglary (§ 459, count 3).

Fourteenth Amendments to the United States Constitution to a jury determination beyond a reasonable doubt of facts necessary to increase his sentence beyond the statutory maximum, as set forth in *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*).

We modify the judgment, remand for resentencing and affirm.

FACTUAL BACKGROUND

The prosecution's evidence

Latya C.

We review the evidence in accordance with the usual rules on appeal. (See *People v. Snow* (2003) 30 Cal.4th 43, 66.) On December 1, 2002, prostitute Latya C. lived at the Orchard Motel, on 108th Street and Figueroa in Los Angeles. She had a party in her room from approximately 10:00 p.m. to midnight. After undressing and putting on her robe, she heard a loud knock on the door. She opened the door, assuming that it was one of her friends who had attended the party. Appellant forced his way into the room, holding a black automatic handgun.

Once inside, appellant pulled out a long "cutting knife" and demanded Latya open her robe, threatening to cut her if she did not.[3] He "was very aggressive and he basically told [Latya] that if [she] did exactly what he told [her] to do, that [she] would live." He forced her to orally copulate him and then raped her without using a condom. Latya felt appellant ejaculate in her vagina, although he told her he had withdrawn his penis before ejaculating so there would be no evidence linking him to the rape. After the rape, Latya felt appellant poke the lower part of her vagina with the knife, drawing blood.

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[3] Latya told a detective that appellant had the gun in one hand and a knife in the other when she opened the door.

After the sex acts, appellant rummaged through Latya's room. He took her wallet containing $28 and $300 from a shoebox and left. Latya followed him and saw that he drove away in a green Saturn. She telephoned the police.[4]

A rape examination of Latya revealed two tears on her vagina, consistent with blunt force trauma, but no evidence of a sharp force injury. DNA analysis of evidence taken from Latya's body and appellant's blood sample matched.

Davera W.

On January 25, 2003, at approximately noon, prostitute Davera W. was walking on Figueroa near 89th Street, in Los Angeles. Appellant pulled up beside her in a beige Saturn and offered her a ride. She accepted and appellant took her to a liquor store so she could buy cigarettes. After doing so, she returned to the car and asked for a ride to her mother-in-law's house. On the way, appellant offered $20 for sex. Davera refused because the offer was too low, and appellant looked dirty.

Appellant drove to an isolated area, got a big "kitchen knife" from the left side of the passenger's seat and made Davera remove her clothes, or he would "shank [her] ass." Davera begged appellant not to kill her. Appellant took $60 from inside her bra. He forced her to orally copulate him and then raped her, without using a condom. He then made her dress and get out of the car, then drove off.

Davera telephoned the police and reported that she had been kidnapped and raped. She denied being a prostitute, fearing the police would not take her seriously if they knew she was a prostitute who had voluntarily entered a car. A rape examination of Davera revealed abrasions and bruising of the lips of her vagina probably caused by blunt force trauma consistent with the claim of rape. It also revealed broken blood

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[4] Latya told police that appellant ejaculated into his hand and not in her vagina. She failed to mention that appellant poked her in her vagina with the knife and that money was stolen from a shoebox. At the preliminary hearing, she testified she did not keep money in a shoebox.

vessels along Davera's soft pallet, consistent with forced oral copulation. Sperm found in Davera's vagina matched appellant's DNA.

Ebony B.

On April 5, 2003, at approximately 9:00 p.m., prostitute Ebony B. was walking near 96th and Figueroa. Appellant approached her in a green Saturn and offered money for sex. She agreed to orally copulate him for $30.

Ebony entered appellant's car, and he drove to a dark, secluded area near the 110 Freeway. He parked the car, pulled a large butcher knife with a thick blade from his side door pocket and demanded Ebony's money. When she said she had none, he told her to get undressed so he could search her, and that she would live if she did everything he said. He threatened to stab her if she did not. Finding no money, he forced Ebony to orally copulate him at knife point. He then raped her, without using a condom, despite her request that he do so, ejaculating inside of her. He told her the car was stolen so it could not be traced to him. He made her get dressed, and get out of the car as it moved.

Ebony did not report the incident to police until several months later because she regarded rape and robbery as professional risks of prostitution and did not think the police would believe her. When later reporting an unrelated crime to police, she mentioned this incident and identified appellant as her attacker in a photographic lineup.

Sharon T.

On May 8, 2003, Sharon T. had known appellant three or four years because she was an old friend of his wife. He owned a green Saturn. That afternoon, she was feeling ill, so she dressed casually in old jeans, a baseball cap, flip flops and no makeup. Sharon got off of a bus in an area known for prostitution, but denied being a prostitute. Appellant pulled alongside her in his car and asked if she wanted a ride, which she accepted because she knew him and recognized his car.

Appellant told Sharon he had to run a few errands before taking her home. He parked his car along Gage Street, pulled out a large butcher knife from the left side of the car, told her to be quiet and do what he said. He threatened to hurt her if she did not remove her clothing and perform oral sex. She complied and then realized that appellant did not recognize her. Sharon was crying and told appellant that it was too hot in the car. Trying to open the window, appellant accidentally unlocked the passenger door, and Sharon fell from the car naked. Appellant drove away with her shoes, bra and purse. Sharon dressed in the alley and walked out of the alley barefoot over broken glass.

A taxicab stopped and asked if Sharon was okay, offering her a ride. The taxi took her directly to appellant's house where she told his wife what happened. About 20 to 30 minutes later, appellant arrived in a green Saturn wearing a different outfit. When Sharon described what appellant did to her, he acted like he did not know what she was talking about. Appellant accused her of being crazy and on drugs. After 10 minutes, Sharon left and telephoned police who arrived shortly.

Sharon underwent a sexual assault examination at which the nurse found that her feet were "extremely dirty." No physical evidence proving or disproving a sexual assault was found. Physical evidence obtained from Sharon matched appellant's DNA.

Veronica A.

Veronica A. was staying with her husband in a motel in Los Angeles. She denied being a prostitute, although the motel was in an area frequented by prostitutes. On June 28, 2003, after midnight, she was walking to the motel when appellant called to her, "Hey, pretty girl," from a dark-colored car. She ignored him. Appellant exited the car, came up behind Veronica and held a "bone-cutting knife" to her throat. He threatened to kill her, forced her into the car and drove to an isolated area.

Appellant held the knife to the back of Veronica's head and searched her clothes for money, finding more than $100. He also took her purse with a cell phone

and other items. With the knife still at the back of her neck, he demanded that she orally copulate him, which she did. He told her that if she did what he said, she would live. He then raped her without a condom, ejaculating after withdrawing his penis. He had told her he would not ejaculate inside of her because that would leave evidence. He told her he had a gun and threatened to shoot her, although she never saw a gun. Appellant then forced Veronica out of the car, told her not to look at the car, and drove away. Veronica went home and telephoned the police and paramedics.

A nurse practitioner performed a sexual assault examination of Veronica. The nurse observed linear abrasions and tenderness in Veronica's vaginal area, consistent with forced sexual assault. Physical evidence taken from Veronica's body matched appellant's DNA.

The defense's evidence

Appellant testified in his own defense. He was on felony probation at the time of the charged offenses. In each case, he testified that the victim was a prostitute whom he hired to perform consensual sex acts. Once the sex acts were finished, he robbed his victims at knife point. He denied raping them at knifepoint or having a gun.

DISCUSSION

I. Sufficiency of evidence

Appellant was convicted of four counts of forcible rape and five counts of forcible oral copulation. Each of his five victims testified that he used a knife in the attack. Only Latya testified that he also used a gun, and Veronica testified that he claimed to have a gun, but she never saw it.

The jury's completed verdict forms for the nine sex offenses each contained the following: "We further find the allegation that defendant personally used a dangerous or deadly weapon or firearm in the commission of the present offense, pursuant to

Penal Code Section 667.61(a), (b) and (e) to be true,"[5] and "We further find that in the commission of the above offense, the defendant CECIL TOWNSEND, JR. used a firearm and deadly weapon, to wit: a knife, within the meaning of Penal Code Section 12022.3(a) to be not true."[6]

The trial court found the weapons findings to be in conflict and reconciled them by ruling that the not true finding with regard to section 12022.3 invalidated the true finding with regard to section 667.61, subdivision (e)(4).

Appellant contends that there is insufficient evidence to support the jury's verdicts on the sex offenses. This contention is premised upon his theory that the jury's finding under section 12022.3, that he did not use a weapon in committing the sex crimes, invalidated the true finding of weapon use as a circumstance under section 667.61, subdivision (e)(4). Because the use of a weapon was the only evidence of force, he argues that the prosecution failed to prove beyond a reasonable doubt the force element of the rape and oral copulation charges.

Before reaching the sufficiency of the evidence claim, we must first consider whether there was inconsistency in the jury's weapons findings, and, if so, its legal impact on his conviction. The firearm enhancement in section 12022.3, subdivision (a) applies if the defendant uses "a firearm *or* a deadly weapon" (italics added) in committing specified sex offenses. The verdict form submitted to the jury

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5 The section 667.61 allegation in count 4, used slightly different wording, stating that it was "pursuant to Penal Code section 667.61 (b)."

Section 667.61, subdivision (e)(4) provides: "The defendant personally used a dangerous or deadly weapon or firearm in the commission of the present offense in violation of Section 12022, 12022.3, 12022.5, or 12022.53."

6 Section 12022.3 states in part: "For each violation or attempted violation of Section 261, 262, 264.1, 286, 288, 288a, or 289, and in addition to the sentence provided, any person shall receive the following: [¶] (a) A 3-, 4-, or 10-year enhancement if the person uses a firearm or a deadly weapon in the commission of the violation."

with regard to that enhancement was unwittingly worded to require that the jury find that appellant used a "firearm *and* deadly weapon." (Italics added.) With that wording, the allegation was true only if appellant used both a knife and a firearm. The jury's untrue finding does not, therefore, necessarily reflect that appellant did not use a weapon. It could reflect that he failed to use a firearm or, alternatively, failed to use a knife. It would appear from the evidence that the jury rendered the untrue finding because of the weak and equivocal evidence as to the use of a gun.

Each victim testified to appellant's use of a "butcher's knife" or "kitchen knife," to force them to engage in sex acts. Only Latya claimed that he also used a gun. But she did not consistently describe the gun, and no gun was ever found. Latya also testified that appellant held a gun when she answered the door to her room, and only took out a knife after he was inside. But she had previously told a detective that appellant held a gun in one hand and a knife in the other when she opened the door. Given that only Latya claimed that a gun was used, and the ambiguities in that testimony, it is likely the jury found that appellant did not use a gun in any of the attacks but used only a knife, which explains their finding that the section 12022.3 allegation as set forth in the verdict forms was untrue.

This analysis reconciles the untrue section 12022.3 finding with the true section 667.61, subdivision (e)(4) finding. As set forth on the verdict forms, the latter allegation required only that appellant used a knife *or* a gun in forcing his victims to engage in sex acts. If the jury found that appellant used only a knife, it would have had to have found the section 667.61, subdivision (e)(4) circumstance true.

While the trial court erroneously considered the weapons findings to be in conflict, it nonetheless correctly concluded that the jury's section 12022.3 untrue finding invalidated the section 667.61, subdivision (e)(4) true finding. Section 667.61, subdivision (e)(4) requires a finding of firearm use under one of the specified firearm statutes, including section 12022.3. Such a finding was not made and with the true

finding on the section 667.61, subdivision (e)(4) invalidated, there was no jury finding that appellant used any weapon.

While there is no conflict between the jury's two weapons findings, as corrected by the trial court, they are inconsistent with appellant's conviction of the sex offenses, which require the use of "force, violence, duress, menace, or fear." (§§ 288a, subd. (c)(2); 261, subd. (a)(2).) The evidence established that the use of a weapon was the mechanism by which the force, fear, duress or menace was instilled. We must therefore determine the impact, if any, of this conflict on the sex convictions.

Section 954 provides in part that "[a]n acquittal of one or more counts shall not be deemed an acquittal of any other count." These principles are applicable in resolving an inconsistency between a not true finding on an armed allegation and a guilty verdict. (See *People v. Federico* (1981) 127 Cal.App.3d 20, 32 (*Federico*).)

In *People v. Lewis* (2001) 25 Cal.4th 610, 655-656, our Supreme Court concluded that even if it viewed the sentencing allegations in several of the counts as inconsistent, "defendant is not entitled to reversal on this basis. It is well settled that, as a general rule, inherently inconsistent verdicts are allowed to stand. [Citations.] The United States Supreme Court has explained: '[A] criminal defendant . . . is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts. This review should not be confused with the problems caused by inconsistent verdicts. Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt. [Citations.] This review should be independent of the jury's determination that evidence on another count was insufficient.' [Citation.]"

In *Federico*, the defendant was found guilty of murder and robbery. The jury found the special allegations under sections 12022, subdivision (a) and 12022.5 that he was armed with and used a firearm during the commission of the offenses and under section 12022, subdivision (b) that he used a dangerous and deadly weapon, a baseball

bat, in the commission of the robbery, to be untrue. (*Federico, supra,* 127 Cal.App.3d at p. 24.) The evidence had established that the cause of death was one or more bullets to the victim's head. The Court of Appeal concluded that the jury's finding that the defendant was not armed in the commission of the murder was "logically inconsistent with its verdict that he was guilty of the murder." (*Id.* at p. 31.) It nonetheless found that the inconsistency was not a basis for reversal of the murder conviction (*ibid.*) because the evidence was "plainly sufficient to support defendant's conviction of murder." (*Id.* at p. 33.) The above quoted language of section 954 "'was written into the section for the purpose of declaring the law that a verdict apparently inconsistent shall afford no basis for a reversal where the evidence is sufficient to support the conclusion that the defendant is guilty of the offense of which he stand convicted.'" (*Federico, supra,* at p. 32, quoting *In re Johnston* (1935) 3 Cal.2d 32, 36; see also *People v. Lopez* (1982) 131 Cal.App.3d 565, 571 [defendant convicted of six counts of assault with deadly weapon but jury found that he did not personally use a firearm in committing the offenses not invalidated because of their rational incompatibility].)

While *Federico* acknowledged a limited exception to the rule where, "all of the essential elements of the crime of which the defendant was acquitted are identical to some or all of the essential elements of the crime of which he was convicted, *and proof of the crime of which the defendant was acquitted is necessary to sustain a conviction of the crime of which the defendant was found guilty"* (*Federico, supra,* 127 Cal.App.3d at p. 32), that exception is inapplicable here. The use of a knife is not an essential element in proving forcible oral copulation or rape.

Consequently, if there is sufficient evidence that appellant used a weapon, his convictions must be sustained in spite of the inconsistency with the weapons allegations. "In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin*

(1998) 18 Cal.4th 297, 331.) We resolve all conflicts in the evidence and questions of credibility in favor of the verdict, and indulge every reasonable inference the jury could draw from the evidence. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) Reversal on this ground is unwarranted unless '"upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]."' (*People v. Bolin, supra,* 18 Cal.4th at p. 331.)

The evidence here was plainly sufficient to support a finding of the use of force, violence, duress, menace or fear. The negative finding on the weapons allegations was a determination more favorable to appellant than the evidence warranted based on a technical error in the wording on the verdict form. Each of his five victims, who did not know each other, testified to a similar modus operandi by appellant in perpetrating his sex crimes, including use of a butcher knife obtained from a location near the seat of his car. Some of the victims indicated that he threatened to stab or "shank" them if they did not orally copulate him and have intercourse with him. He never used a condom and told some of his victims that he stole the vehicle he was driving so it could not be traced to him or did not ejaculate inside of them so as not to leave evidence. Moreover, while the jury's true finding on the section 667.61, subdivision (e)(4) circumstance was overturned on the technicality that it required a true finding on the section 12022.3 deadly weapon allegation, it nonetheless reflects that the jury believed that appellant used a deadly weapon.

II. Sentencing errors

A. The verdicts

The jury convicted appellant of forcible oral copulation and forcible rape related to Latya (counts 1 & 2), Ebony (counts 5 & 6), Veronica (counts 9 & 10) and Davera (counts 13 & 14). It also found to be true two section 667.61, subdivision (e) circumstances with respect to each of those convictions; that appellant had personally used a deadly or dangerous weapon (subd. (e)(4)) and had committed a specified offense against multiple victims (subd. (e)(5)). The jury also convicted appellant of

forcible oral copulation of Sharon (count 4) and found only one of the section 667.61, subdivision (e) circumstances to be true; that appellant had personally used a deadly or dangerous weapon.

In addition, appellant was convicted of assault with a deadly weapon related to Latya (count 12), attempted second degree robbery related to Ebony (count 7), second degree robbery relating to Davera (count 15), and second degree robbery (count 11) and two counts of false imprisonment (counts 8 & 16) relating to Veronica. As to the robbery and attempted robbery counts, the jury found to be true the personal use of a deadly or dangerous weapon enhancement within the meaning of section 12022, subdivision (b)(1).

B. Appellant's sentence

The trial court imposed full, consecutive indeterminate sentences of 25 years to life on all but one of the sex offenses, counts 1, 2, 5, 6, 9, 10, 13 and 14. On the final sex offense, count 4, it imposed a full, consecutive term of 15 years to life. On count 7 for attempted second degree robbery, the trial court sentenced appellant to a consecutive one year eight months, calculated as one-third the midterm of two years plus one year for the personal use of a deadly weapon enhancement. On count 8 for false imprisonment, the trial court sentenced appellant to a consecutive eight months, calculated as one-third the middle term of two years. On counts 11 and 15 for second degree robbery, it imposed consecutive sentences of two years, calculated as one-third the middle term of three years enhanced by one year for the firearm enhancement under section 12022, subdivision (b)(1). On count 12 for assault with a deadly weapon, appellant was sentenced to a consecutive term of one year, calculated as one-third the middle term of three years. The trial court stayed sentence under section 654 on count 16 for false imprisonment.

C. One-strike sentencing scheme

Section 667.61 provides a "one-strike" sentencing scheme. Subdivision (a) provides that any person convicted of a sex offense specified in subdivision (c), which

includes forcible rape and forcible oral copulation, under two or more of the circumstances specified in subdivision (e), or one or more circumstances specified in subdivision (d), "shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 25 years. . . ." Subdivision (b) of section 667.61 provides that a person having one of the circumstances in subdivision (e) "shall be punished by imprisonment in the state prison for life and shall not be eligible for . . . parole for 15 years. . . ."

Among the qualifying circumstances provided in subdivision (e) of section 667.61 are defendant's commission of the sex offense during commission of a burglary (subd. (e)(2)), defendant's kidnapping the victim (subd. (e)(1)), defendant's personal use of a dangerous or deadly weapon or firearm (§ 667.61, subd. (e)(4)) and defendant's conviction in the present case or cases of committing the specified offenses against more than one victim. (§ 667.61, subd. (e)(5).)

Subdivision (g) of section 667.61 provides that the term specified in subdivision (a) or (b) "shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion. If there are multiple victims during a single occasion, the term specified . . . shall be imposed on the defendant once for each separate victim."

D. Unauthorized sentences on counts 1, 2, 5, 6, 9, 10, 13, and 14

In connection with counts 1, 2, 5, 6, 9, 10, 13 and 14 the information alleges the multiple victims circumstance under subdivision (e)(5) of section 667.61 and use of a deadly or dangerous weapon under subdivision (e)(4). In addition, in connection with counts 1 and 2, it alleges the circumstance that the sex acts were committed during the commission of a burglary under subdivision (e)(2), and, in connection with counts 9 and 10, the circumstances that the defendant kidnapped the victim to commit the sex offenses under subdivision (e)(1). The jury found the multiple victim and deadly weapon circumstances to be true as to each of the counts and the commission of a burglary and kidnapping of the victim circumstances to be not true. The trial court

correctly concluded that the not true finding of the gun use allegation under section 12022.3 invalidated the subdivision (e)(4) true finding, leaving only one circumstance applicable to each of these counts. The trial court nonetheless imposed sentences of 25 years to life pursuant to section 667.61, subdivision (a).

Appellant contends that the trial court erred in sentencing him to 25 years to life on counts 1, 2, 5, 6, 9, 10, 13 and 14 pursuant to section 667.61, subdivision (a) because there was only one circumstance in subdivision (e) found by the jury to be true. Respondent agrees with this contention, as do we.

After the trial court struck the subdivision (e)(4) findings of use of a deadly or dangerous weapon, because of the untrue jury finding with respect to section 12022.3, there remained only one circumstance under subdivision (e) which mandated that appellant receive only consecutive, 15-years-to-life sentences under subdivision (b) of section 667.61.

E. Unauthorized sentence on count 4

In connection with count 4, the information alleges against appellant only the deadly or dangerous weapon circumstance in subdivision (e)(4) of section 667.61 related to the forcible oral copulation of Sharon. As previously discussed, the jury found the section 12022.3 firearm use allegation to be untrue, and, as a result, the trial court found the deadly weapon circumstance under section 667.61, subdivision (e)(4) to be invalid. It sentenced appellant to an indeterminate term of 15 years to life under section 667.61, subdivision (b).

Appellant contends that the trial court's sentence on count 4 was unauthorized. He argues that because the only subdivision (e) circumstance alleged in connection with that count, the deadly or dangerous weapon circumstance, was stricken by the trial court, count 4 did not qualify for one-strike sentencing. Respondent agrees, as do we.

As discussed in part IIC, *ante*, the jury's not true finding of the allegation of weapon use under section 12022.3, invalidated its true finding of weapon use under

section 667.61, subdivision (e)(4). As that circumstance was the only one alleged in connection with count 4, there were no circumstances under subdivision (e) found in connection with this count, and sentencing appellant to 15 years to life under the one-strike law was improper.

F. Unauthorized multiple life terms

The trial court imposed two life terms for appellant's conviction of rape and oral copulation of each of the four victims for which he was convicted of both offenses, apparently relying upon the language in section 667.6, subdivision (d) which permits "full, separate, and consecutive term[s]" "if the crimes involve separate victims or involve the same victim on separate occasions."

Appellant contends that the trial court erred in doing so. He argues that subdivision (g) of section 667.61 provides that the life sentences authorized by that section be imposed only once for any offenses committed against a single victim "during a single occasion." (§ 667.61, subd. (g).) Respondent agrees with appellant. We also agree.

The California Supreme Court in *People v. Jones* (2001) 25 Cal.4th 98, 105 made clear that the standard of "separate occasion" set forth in section 667.6, subdivision (d) was not the same as the standard of "single occasion" set forth in section 667.61, subdivision (g). The former term has been interpreted to mean "reasonable opportunity for reflection" (*People v. Jones*, *supra,* at p. 105) whereas the latter term simply means in "close temporal and spatial proximity" (*id.* at pp. 106-107). With respect to each of appellant's victims, the forcible rape occurred immediately after the forced oral copulation. This constituted a "single occasion" within the meaning of section 667.61, subdivision (g). Therefore, appellant could only be given a life sentence for one of the two sex offenses committed against each of the victims of both.

G. Blakely error

The trial court sentenced appellant on the sex offenses to full, separate and consecutive terms pursuant to section 667.6, subdivision (d), based on its finding that the offenses occurred against the same victim on separate occasions. It also sentenced him to consecutive terms on the nonsex offenses, calculated at one-third of the midterm, based on its findings that the crimes involved separate acts of violence, and were committed at different times at different places, and were not a single period of aberrant behavior. It found no factors in mitigation. The trial court imposed the "full term consecutive" on the sex offenses pursuant to section 667.6, subdivision (d).

Appellant contends that the trial court's imposition of "full, separate and consecutive sentences" for the sex offenses, and consecutive sentences for the nonsex offenses, deprived him of his right to a jury determination beyond a reasonable doubt of all facts necessary to increase his sentence beyond the statutory maximum and to due process, as set forth in *Blakely.*

Appellant's contention that *Blakely, supra,* 542 U.S. 296 renders the imposition of consecutive sentences in this case unconstitutional is without merit. This contention was rejected by the California Supreme Court in *People v. Black* (2005) 35 Cal.4th 1238, which concluded that "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*Id*. at p. 1244.) We are, of course, bound by this decision. (*Auto Equity Sales, Inc*. *v. Superior Court* (1962) 57 Cal.2d 450, 455.)[7]

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[7] The United States Supreme Court has granted certiorari in *People v. Cunningham* (Apr. 18, 2005, A103501) [nonpub. opn.], certiorari granted *sub nom*. *Cunningham v. California* (Feb. 21, 2006, No. 05- 6551) ___ U.S. ___, on the issue of whether *Blakely* applies to California's determinate sentencing law.

DISPOSITION

Appellant's sentence is modified to provide a term of 15 years to life on counts 1, 5, 9 and 13. The matter is remanded for resentencing under any other applicable law, other than the one strike law, on counts 2, 4, 6, 10 and 14. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ