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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RALPH BALDENEGRO, Defendant and Appellant.	A126904 (Alameda County Super. Ct. No. CH44743)

I. INTRODUCTION

Ralph Baldenegro appeals from the judgment after a jury convicted him of 13 counts, including residential burglary, sexually assaulting his ex-girlfriend's 14-year-old daughter, inflicting corporal injury on his ex-girlfriend, who was also the mother of his six-year-old son, and kidnapping the boy. Appellant was sentenced to 94 years to life in prison. On appeal, he contends the trial court erred in failing to give a unanimity instruction; that prosecutorial misconduct deprived him of a fair trial; that the evidence of intent was insufficient to support a conviction of robbery; and that the evidence was insufficient to support mandatory consecutive life terms. We will affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

On April 20, 2009, the Alameda County District Attorney filed an amended information charging appellant with first degree residential burglary (Pen. Code, §§ 459/460; count 1)[1] with personal use of a firearm (§§ 12022.5, subd. (a), 12022.53,

[1] All further unspecified references are to the Penal Code.

subd. (b)); assault with a firearm against Jane Doe Two (§ 245, subd. (a)(2); count 2) with personal use of a firearm (§ 12022.5, subd. (a)); sexual assault against Jane Doe Two with the intent to commit forcible digital penetration while in commission of a first degree burglary (§ 220, subd. (b); count 3); three counts of forcible digital penetration against Jane Doe Two (§ 289, subd. (a)(1); counts 4 through 6), each with personal use of a firearm (§§ 12022.5, subd. (a), 12022.53, subd. (b)) and "one-strike" clauses alleging that the offense occurred during a burglary with the use of a firearm and tying or binding (§§ 667.61, subds. (d)(4), (e)(2), (4) & (6)); attempted first degree murder of Jane Doe One (§§ 187, subd. (a)/664, subd. (a); count 7); corporal injury against Jane Doe One (§ 273.5, subd. (a); count 8); making criminal threats against Jane Doe One (§ 422; count 9); assault with a firearm against Gregory McClain (§ 245, subd. (a)(2); count 10) with the personal use of a firearm (§ 12022.5, subd. (a)); robbery of McClain (§ 211; count 11); unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a); count 12); disobedience of a stay away order (§ 166, subd. (c)(1); count 13); and kidnapping John Doe (§ 207, subd. (a); count 14).

Prosecution Case

Appellant and Jane Doe One lived together from October 1996 through May 23, 2006, in Jane Doe One's house in Fremont. Jane Doe One and appellant had a son together, John Doe, and Jane Doe One had a daughter, Jane Doe Two, from a prior relationship. John Doe was six years-old at the time of the events in question and Jane Doe Two was 14.

During Jane Doe One's relationship with appellant, he was very controlling and constantly checked on her. He would not allow her to reprimand John Doe when he misbehaved. There were also incidents of domestic violence in which appellant had pushed Jane Doe One and forced her to the ground. On one occasion, he had grabbed her by the neck. She did not report these incidents because appellant would block her from using the phone, had threatened to burn the house down, and had told her that it would "all be over" before the police could arrive.

In 2002, the physical intimacy between Jane Doe One and appellant ended, and appellant moved into John Doe's bedroom. In October 2005, Jane Doe One told appellant the relationship was over and asked him to move out. Appellant said he would leave, but only if he could take John Doe with him. Jane Doe One refused, and told appellant that she would use whatever legal means were necessary to get him out. In November 2005, appellant left eggs boiling on the stove and the fire department had to come.

Jane Doe Two did not like appellant or the way he disciplined her. He reprimanded her for the way she treated John Doe. Jane Doe Two thought appellant was mean to her mother, her brother, and her. On one occasion, she locked appellant out of the house and called the police.

Just prior to May 23, 2006, Jane Doe One found a gun in appellant's things in John Doe's room. She told appellant he had to remove it from the house. Thereafter, he began stealing mail and other items from Jane Doe One and Jane Doe Two. The missing items were found in his van after May 23, 2006.

The Uncharged May 23, 2006, Incident

On May 23, 2006, appellant became upset because Jane Doe One locked her bedroom door as she went to bed. Appellant told her he would "bust it open" if she did not unlock the door. She unlocked the door and appellant told her he wanted to talk about their relationship. She told him there was no relationship and that she wanted him to leave so she could sleep. At that point, appellant, who weighed 280 pounds, lunged at Jane Doe One. She fell into the bathroom and knocked the shower door off as she fell to her knees. Appellant began strangling her, saying, "I told you that it was going to come to this." He told her that if he could not have her then no one else could. When John Doe came into the bathroom crying, appellant loosened his grip and sent their son back to bed.

After John Doe left, appellant put Jane Doe One in a headlock and pulled her out of the bathroom into the hallway, banging her head on the doorjamb. He told her to be

quiet or he would break her neck. He then began strangling her again. When John Doe came into the hallway, appellant again eased up and made Jane Doe One help him put John Doe back to bed. Appellant then forced Jane Doe One to sit in the living room. He apologized to her but said that she had driven him to that point. He told her not to call the police or he would "blow his brains out" with his loaded gun. Eventually, Jane Doe One went back to bed but she could not sleep because she feared for her life and appellant would not let her lock the door.

Jane Doe One contacted the police the next day, May 24. She spoke with Officer Kimberly Loughery, who observed bruising on her neck and scratches on her face. The officer photographed her injuries and helped her in obtaining a restraining order against appellant.

Later that day, while Jane Doe One was with the police, she answered a call on her cell phone from appellant. Appellant told her that he had John Doe and that he was not coming back to the house because he knew that she had contacted the police. At Jane Doe One's house, Officer Loughery picked up the ringing telephone while she was searching the residence and spoke with appellant. She asked appellant at least four times to immediately go to the police department. Appellant refused and said he would go the next day.

On May 25, 2006, appellant spoke with Officer Loughery and Sergeant Frederick Bobbit at the police station. The officers video-recorded the interview and photographed three small scratches on appellant's forearms. They asked him numerous times where John Doe was, but appellant refused to tell them. After the interview, Officer Loughery arrested appellant. Appellant was experiencing a diabetic episode, so he was sent to the hospital, after which he was sent to a psychiatric facility. The police eventually located John Doe in San Jose with one of appellant's other children from a prior relationship.

Following the May 23, 2006, incident, appellant was permitted to call John Doe twice a week and to have supervised visits with him at Terra Firma every Sunday.

Pursuant to the restraining order, appellant was not allowed to contact Jane Doe One or Jane Doe Two.

The Events of November 9, 2006

The events of November 9, 2006, led to the charges in this case. Fourteen-year-old Jane Doe Two lived with her mother and had known appellant since she was four years old. At around 3:00 p.m., Jane Doe Two walked home from school and found appellant behind the front door when she went inside. Appellant had a gun in his hand and looked "crazy." He told her "today is not your lucky day." He forced her to lie on the ground, duct-taped her wrists together behind her back, and told her to be good and not yell. Appellant said that everything was her mother's fault.

Appellant then pulled Jane Doe Two up by her shoulders and pushed her toward the bathroom, telling her to use the bathroom because she would be waiting a long time. In the dining room, appellant put duct tape over her mouth and told her a long story about how bad her mother had been to him. He then pushed her into her bedroom, cut the duct tape off her wrists, and took off all of her clothes except her underwear. He duct-taped her wrists together behind her back again, duct-taped her ankles together, made her lie on the bed, put duct tape over her eyes, covered her body with a blanket, and left the room. She heard him walk around the house, coming back from time to time and placing things on the nightstand in the bedroom.

Eventually appellant returned to the bedroom, cut the duct tape off Jane Doe Two's ankles, and cut off her underwear. He told her to spread her legs. She told him "no" through the duct tape multiple times. When appellant grabbed her legs, she started kicking and touched the skin of his bare chest with her feet. Earlier, he had been wearing a shirt. Appellant grabbed her neck and started choking her, telling her to "shut up" or he would "make it worse." She stopped resisting because she was having trouble breathing. Appellant then forced her legs open, touched her labia, and inserted his finger into her vagina. He moved his finger around inside her for "a few minutes." Appellant then removed his finger and Jane Doe Two felt appellant rub what felt like lotion on her

"private parts." He then reinserted his finger, again moving it around inside her for "a few minutes." He removed his finger and then put something that sounded like a vibrator on her "private parts area."[2] Appellant inserted his finger a third time, and this time he bit and sucked on Jane Doe Two's right nipple as he moved his finger inside of her.

Appellant was talking to Jane Doe Two while he was touching her, asking her "if it felt weird" and "if people from school [had] done this to [her]. He told her that "everything he was doing was [her] mom's fault and to blame her for everything." He also said it was what she (Jane Doe Two) wanted, and kept telling her to be quiet. He kept his finger inside her for a "few minutes" each of the three times he penetrated her vagina.

Appellant then covered her with a blanket and left the room. She still had her wrists bound behind her back and duct tape over her eyes and mouth. She could hear that appellant was working on the computer in her mother's bedroom.

Eventually, appellant cut the duct tape off her wrists and allowed Jane Doe Two put her clothes back on and go to the bathroom while she was still blindfolded. He knew that Jane Doe One had called, so he lifted the duct tape off Jane Doe Two's left eye and made her play her cell phone messages on the speaker, including her mother's message, so he could hear them. Appellant put the duct tape back over both eyes and her wrists, and made her lie down on her bed again. He did not re-tape her ankles. He left, but came back into her room again after awhile and told her another story about her mother treating him badly. He told her that he was going to make her mother "tell the truth" and that she would never see her little brother, John Doe, again.

After leaving work around 5:00 p.m. and picking up John Doe from school, Jane Doe One arrived at home. John Doe liked to use his mother's keys to unlock the house, so he entered first while his mother was gathering her things from the car. John Doe was excited to see his father, and he wanted to play. When Jane Doe One entered the house,

[2] The item sounded similar to the noise made by a nose-hair trimmer that was later recovered from the vehicle appellant was driving.

she screamed when she saw appellant. She tried to get out of the house, but appellant pulled her inside and covered her mouth as she struggled to get away from him. Appellant punched her repeatedly, attempted to gouge her eyes, and pulled her by her hair, hitting her head twice against the wall. He repeatedly told her to "shut up," and told her it was "all her fault." When Jane Doe One told John Doe to call 911, appellant told him not to and said, "Daddy is here to punish mommy. She's been bad." Jane Doe One told appellant that her mother was expected to arrive. Appellant responded, "Oh, well, I guess we'll just have to tie grandma up, too."

Jane Doe One calmed down when appellant overpowered her. He handcuffed her wrists behind her back and duct-taped her mouth and nose. When Jane Doe One told him she could not breathe, he initially said he did not care, but then moved the tape to cover only her mouth. He then pushed her into the master bedroom and duct-taped her ankles together. Jane Doe One believed appellant was going to kill her because he told her she was going to "pay" for what she had done and he was there to do what he should have done in the first place. When John Doe came into the bedroom, appellant told him that his mommy had been a "very bad girl" and he was putting her in a "time-out." Appellant went with John Doe to the living room and turned on the television for him.

Jane Doe One hopped to the sliding glass door and into the sunroom at the back of the house. She made her way into the backyard and through a loose board in the fence. As she went through the fence, she fell forward onto her chin, which happened to loosen the duct tape on her mouth. She got up and hopped to her neighbor's sliding glass door and screamed for help, banging on the door with her shoulder because her wrists were still bound. Jane Doe Two could hear her mother screaming outside.

At around 6:25 p.m. that day, Gurjiwan Kaur was at her residence which backed up to Jane Doe One's house. Kaur saw Jane Doe One at her back sliding glass door. Jane Doe One was bloody, screaming for help, and trying to open the door with her feet. Kaur was scared so she turned off the lights and called 911.

Jane Doe One then saw appellant in Kaur's yard. Appellant pulled her by her hair and forced her to the ground. He began kicking and punching her in her face and chest, and told her he was going to kill her.

Gregory McClain,[3] a home inspector, was inspecting a house after dark when he heard a woman screaming. He ran across the street, shined a light over the fence, and saw a man he would identify as appellant hitting a handcuffed woman. McClain is 6'6" and had no trouble seeing over the fence. McClain opened the gate and walked through, telling appellant to leave the woman alone. Appellant, who was continuing to hit and kick the woman, told McClain to go away, it was a domestic dispute, and "none of [his] business." McClain repeated, "leave her alone," but backed away when appellant swiftly approached him. McClain dialed 911, but was put on hold. Appellant followed McClain outside the gate and twice demanded McClain's cell phone. When McClain did not comply, appellant pulled a gun out of his pocket, pointed it at McClain's head, and said, "Give me the fuckin' phone." McClain feared for his life, so he gave appellant his phone. Appellant looked at the phone for about 10 to 15 seconds, and McClain told appellant there were other people calling 911. Appellant looked around. At the time, there were other people standing on their doorsteps. Appellant then threw McClain's phone into a bush about 30 feet away from the fence.[4] McClain went back to the house he was inspecting, put on his boots which he had removed to do the inspection, and returned to the scene.

Jane Doe One was trying to get to her feet when she saw John Doe come into the yard. She asked him if he called 911. John Doe indicated that he had not, pushed her back down to the ground, and called to appellant, "Hurry, Daddy, she's getting away." Appellant went back into Kaur's yard, but he walked right by Jane Doe One. He left with John Doe, telling him, "come on . . . . We have to get out of here."

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[3] The robbery count was based on appellant's confrontation with McClain.

[4] McClain's cell phone was later found in the grass when a police officer dialed its number.

Jane Doe Two heard appellant leave with John Doe. She was able to get the duct tape off her mouth and eyes, but not her wrists. Around 6:30 p.m., she called 911. Her panicked 911 call was played for the jury. Jane Doe Two informed dispatch that appellant had a gun.

After calling 911, Jane Doe Two fled to the McKeithans' residence around the corner. Ken McKeithan heard banging on the door and opened it to find Jane Doe Two, who was friends with his son and daughter. Jane Doe Two was crying and distraught. When McKeithan saw that her wrists were duct-taped behind her, he used scissors to free them. He asked her what was going on, and she said, "He's back, he's back. He's trying to kill us."

In addition to Jane Doe Two's 911 call, the Fremont Police Department dispatch received several other calls from the area about a woman screaming and a "person running around with a gun."

McClain returned to Kaur's house to help Jane Doe One. She was extremely frightened and screaming that appellant had taken her son. McClain cut the duct tape off her ankles.

Officer Dennis Baca arrived at the Kaur residence and found Jane Doe One in the driveway with Kaur and McClain. Her hands were cuffed behind her back and she looked "pummeled," "beaten," and "distraught." Baca was able to uncuff one of her hands. He made sure that an ambulance was on its way.

Officer Loughery subsequently arrived to find Jane Doe One, whom she recognized from the May 2006 incident, sitting in a folding chair in the Kaurs' garage. Loughery was able to remove the handcuffs completely. She collected them as evidence, along with the duct tape from Jane Doe One's ankles.

Sergeant Frederick Bobbit was dispatched to Jane Doe One's residence on reports of a woman screaming. No one was home when he arrived. After a protective sweep, he went through a fence board to the Kaur residence, where he found Loughery attending to

Jane Doe One in the garage. Unable to locate John Doe, Bobbit activated an Amber Alert. Jane Doe One was taken to the hospital.

Meanwhile, Officer Jason Franchi interviewed Jane Doe Two at the McKeithan residence. Jane Doe Two was upset, crying, and traumatized during most of the interview.

Around 8:00 p.m., Officer John Gaziano processed the crime scenes. He photographed a blood trail from the fence line of Jane Doe One's house to the back and front yards of the Kaur residence, and the duct tape and blood on Kaur's mat. At Jane Doe One's house, Gaziano found a blood swipe on the metal plate of the doorknob on the front door, duct tape (some with light-colored hair on them) in various parts of the house, an aluminum bat, a scratch on the metal portion of a window in the sun room, a screen propped up near that window, and blood in various places including on the light switch in John Doe's bedroom, the sliding glass door in the master bedroom, and the fitted sheet on Jane Doe Two's bed.

At the hospital, Jane Doe One's chest was x-rayed and her chin was stitched closed. A police officer took photographs of her injuries and noticed that she was trembling and crying. She had a cut on her scalp that was still bleeding, a cut on her finger, small cuts under her right eye, a cut on her chin, bruises on her legs and hips, red marks around her wrists, a mark on her face, and small abrasions on her elbow. Her hands and fingers were swollen and discolored, and her boots had fresh scuff marks and a smear of blood.

Around 11:00 p.m., Jane Doe One left the hospital and returned to her home with several police officers. Her car was missing. While walking through the house, she pointed out strips of duct tape stuck on a stereo cabinet, a knife hanging from the window covering in the master bedroom, and the aluminum bat which did not belong to her or her children. She also found a stack of razor blades on top of the armoire. None of these items belonged to her or her children; she gave them to Sergeant Bobbit.

At 11:08 p.m., Jane Doe Two arrived at the hospital. Dana Kelly, a physician's assistant and an expert in sexual assault examination, examined Jane Doe Two. Kelly documented that Jane Doe Two had bruising and swelling on her right nipple and areola, consistent with someone biting her breast. She also had injuries to the lower part of her vaginal opening and posterior fourchette, including redness, swelling, and abrasions. Jane Doe Two could not tolerate having a speculum inserted into her vagina, so Kelly was unable to do an internal examination. Kelly noticed that Jane Doe Two had adhesive on her wrists and that her ankles were sticky. Her injuries were consistent with what she described taking place during the incident. Kelly opined that Jane Doe Two's injuries were consistent with at least an attempted digital penetration, but she could not determine whether there was complete penetration because she was unable to perform the internal examination.

Around 11:30 p.m. in Red Bluff, Highway Patrol Officer Balma spotted appellant driving the gold Saturn as a result of the Amber Alert broadcast earlier that evening. Officer Balma arranged for assistance and initiated a vehicle stop. Appellant did not pull over, and instead led several police vehicles on a 40-mile chase until officers were able to spike appellant's tires and stop his vehicle. Inside the Saturn, officers found a six-year-old "crumpled" down in the back seat floorboard area.

A search of the Saturn revealed two pistol magazines and brass knuckles. Officer John Balma also found a .380 cartridge (which fit into the magazines) in appellant's pocket. Sergeant Bobbit traveled to Red Bluff where he placed appellant in custody. John Doe was reunited with his mother in San Leandro at a center for interviewing traumatized children.

The Saturn was later towed to the police station where it was processed by Officer Gaziano. He found three knives and the passports of Jane Doe One, Jane Doe Two, and John Doe. Inside a backpack in the car, Gaziano found a razor blade and a roll of duct tape. Inside a Crown Royal bag, the officer found a bottle of K-Y gel and a nose hair trimmer which vibrated when it was turned on.

Defense Case

Appellant testified in his own defense. Although he and Jane Doe One had not formally married, he felt as though they were married. He and Jane Doe One met in 1993 and started living together in 1996. Appellant was the primary caregiver of their son, John Doe, for his first through sixth years, and they had a close relationship.

Appellant had no problems with Jane Doe Two until she started junior high school. She used objectionable language and, on one occasion, she called the police on appellant when he was locked out of the house. Jane Doe Two also hit her brother hard, locked him in closets, and tormented him about his fear of spiders. Appellant asked Jane Doe One to talk to Jane Doe Two, but the problems continued. When confronted, Jane Doe Two said it would not happen again, but it did.

Appellant testified that he moved into his son's room in January 2006 when Jane Doe One told him he could leave the house. Appellant told her that he would never leave without John Doe. Jane Doe One first demanded that appellant leave around May 23, 2006. Appellant and Jane Doe One had no physical confrontations with each other prior to May 23, 2006, but their relationship was strained because appellant was finding welt marks on John Doe that he believed were caused by Jane Doe Two. Jane Doe One was unable to control Jane Doe Two's actions.

On May 23, 2006, appellant knocked on Jane Doe One's bedroom door because she was making so much noise that John Doe complained. Jane Doe One was angry and smacked appellant in the face. She then came at appellant, and he tried to stop her from kicking him. They both fell during the struggle, and Jane Doe One stabbed him in the arm with a pair of fingernail scissors. Appellant denied that he threatened or strangled Jane Doe One. Jane Doe One later apologized and they both admitted that they had lost their tempers.

The next morning, Jane Doe One told appellant that she was not going to "let it go," meaning that she was going to call the police, and that appellant should leave the house immediately. Appellant was surprised. He denied that he threatened suicide, but

admitted that he said he would never leave without his son. When appellant spoke to the police later that day, he told them that he had John Doe. Appellant did not go home that night because he did not want another confrontation.

The next day, May 24, as the police had requested, appellant went to the police station. He left John Doe in the care of a "professional nanny" named Steffany who was also the wife of appellant's adult son. Appellant met with Officer Loughery and Sergeant Bobbit. Appellant testified that the interview "got ugly" when appellant refused to tell the officers exactly where John Doe could be picked up. One of the officers told appellant that John Doe and Steffany had been killed in a car crash.[5] Appellant blacked out and woke up in a psychiatric hospital. He was then transferred to the county jail where he was served with a restraining order.

After he was released, appellant lived in his car for awhile. He got the restraining order modified so he could visit his son. He was permitted phone calls twice a week with John Doe and one supervised visit per week at Terra Firma. He was not allowed to contact Jane Doe One or Jane Doe Two pursuant to the restraining order.

During visits at Terra Firma, appellant saw scratches on John Doe's neck and bruising on his arms and forearms. He believed the injuries were caused by Jane Doe Two. Appellant testified that he believed John Doe was in imminent danger. At his last visit with John Doe, the boy whispered to him, "Daddy, when are you coming to save me?"

Appellant testified that he entered Jane Doe One's house on November 9, 2006, to "take [John Doe] out of a bad situation." When Jane Doe Two arrived home from school, he told her he was there to take John Doe. Appellant did not have a gun or a bat. He admitted asking her if she wanted to use the bathroom, "because I figured she was going to be waiting for a long time." Appellant denied sexually assaulting Jane Doe Two. He testified that he made her take her clothes off and restrained her with duct tape so she

[5] Both officers testified at trial and denied telling appellant that John Doe was dead.

could not leave or give him any problems. He duct-taped her mouth, and later her eyes, so that she could not warn anyone about his presence.

When Jane Doe One arrived home with John Doe just after 6:00 p.m., John Doe was excited to see appellant. Jane Doe One came in and appellant announced, "I came here to get [John Doe]." Jane Doe One dropped everything she was carrying and started screaming. Appellant put his hand on her to stop her from leaving. He used no gun, no bat, no brass knuckles. Appellant pulled her back inside and closed the door. Jane Doe One yelled at John Doe to call 911, but he refused and said he did not want to live there anymore. Jane Doe One lunged at John Doe. Appellant restrained her to keep her from hurting John Doe. Appellant ordered her to her knees and handcuffed her. Appellant did not hit, kick, or punch Jane Doe One. When Jane Doe One tried to pick up the belongings she had dropped, John Doe tackled her and she hit her head on the wall. Appellant took Jane Doe One into the master bedroom where he duct-taped her mouth and ankles.

Appellant and John Doe went and played in the TV room. Some time later, John Doe told him that Jane Doe One had escaped. Appellant found her against the sliding door of the house behind theirs. She was screaming for someone to call 911 and banging her head against the window. Appellant pushed her down, "to prevent her from making a bunch of noise, yes." He kicked her feet out from under her when she tried to get up. He did not threaten to kill her.

When McClain came into the yard and asked what was going on, appellant told him it was none of his business. When McClain said he was calling 911, appellant told McClain to give him the phone. When he quickly stepped toward McClain, McClain gave him the phone. Appellant "chucked" it because he did not want McClain to call 911. Appellant denied having a gun or any weapon.

As appellant turned back toward Jane Doe One, he saw John Doe knock her down again. Appellant then left with John Doe, who went with him voluntarily. Appellant took the Saturn, on which he claimed he made more than 60 percent of the payments.

Appellant testified that he had no plan regarding where to go. They stopped for awhile at a McDonald's in Stockton, then continued north on Interstate 5 until they were stopped by the highway patrol from Red Bluff.

Appellant testified that during his relationship with Jane Doe One, she would go with him to collect antique guns. The two magazines, the bullet, and the paper weight that looked like brass knuckles were part of that collection and had been left in the Crown Royal bag in the Saturn since May 2006 when they took their last antique-shopping trip together.

On May 20, 2009, a jury found appellant guilty as charged on 13 of the 14 counts and found all but one of the allegations true. The jury reached no verdict on the attempted murder count (§§ 187, subd. (a)/664, subd. (a); count 7), and made no finding as to one of the enhancements alleged in connection with counts 4 through 6.[6] The trial court declared a mistrial as to count 7, which it subsequently dismissed pursuant to the prosecutor's motion.

On July 24, 2009, the trial court sentenced appellant as follows: three consecutive terms of 25 years to life for the three forcible digital penetration counts; four years for the aggravated assault enhanced by 10 years for the use of a firearm against Jane Doe Two; a consecutive term of one year for the domestic violence count; one year for the assault with a firearm count enhanced by one year, four months for the personal use of a firearm against McClain; and one year, eight months for the kidnapping of John Doe, for a total term of 94 years to life in state prison.

On November 20, 2009, following a restitution hearing, the trial court lifted the stay of sentence previously imposed on July 24, 2009.

On November 25, 2009, appellant filed a timely notice of appeal.

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[6] The jury made no finding regarding whether appellant committed the forcible digital penetration offenses during the commission of the burglary with the intent to commit forcible digital penetration. (§ 667.61, subd. (d)(4).)

III. DISCUSSION

A. *Unanimity Instruction*.

Appellant contends the trial court committed instructional error by not giving a unanimity instruction to ensure that all 12 jurors agreed on the act constituting the entry for purposes of the residential burglary charge. Appellant points to three possible entries that could have constituted the basis for the offense: the entry into the house, or the entry into Jane Doe One's bedroom, or the entry into Jane Doe Two's bedroom. The different possible entries, in addition to the various options for felonious intent (the verdict form for burglary listed four different intents in the disjunctive: intent to commit murder, or intent to inflict corporal injury on Jane Doe One, or intent to commit forcible sexual penetration on Jane Doe Two, or intent to kidnap John Doe), rendered it likely, according to appellant, that the jury's verdict was not unanimous as to the act that constituted the burglary.

Specifically, appellant contends that the prosecution's theory of burglary was that appellant wished to kill Jane Doe One when he entered the house, but the jury acquitted appellant of attempted murder. Appellant suggests that some jurors may have determined that appellant intended to commit a sex crime when he entered Jane Doe Two's bedroom or that appellant intended to inflict corporal injury on Jane Doe One when he entered her bedroom. Appellant contends that each of the four intents "actually attached" to a different entry.

In considering a claim of instructional error, our standard of review is de novo. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.) "Whether or not to give any particular instruction in any particular case entails the resolution of a mixed question of law and fact that, we believe, is however predominantly legal. As such, it should be examined without deference." (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

"In a criminal case, a jury verdict must be unanimous. [Citations.] The court here so instructed the jury.[7] [Citation.] Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 (*Russo*).) The unanimity instruction " 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' " (*Ibid*.) The trial court has a sua sponte duty to give a unanimity instruction where the evidence shows more alleged unlawful acts than are charged. (*People v. Davis* (2005) 36 Cal.4th 510, 561; *People v. Curry* (2007) 158 Cal.App.4th 766, 783.)

"On the other hand, where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the 'theory' whereby the defendant is guilty. (See generally *People v. Jenkins* (2000) 22 Cal.4th 900, 1024-1206.) The crime of burglary provides a good illustration of the difference between discrete crimes, which require a unanimity instruction, and theories of the case, which do not. Burglary requires an entry with a specified intent. (Pen. Code, § 459.) If the evidence showed two different entries with burglarious intent, for example, one of a house on Elm Street on Tuesday and another of a house on Maple Street on Wednesday, the jury would have to unanimously find the defendant guilty of at least one of those acts. If, however, the evidence showed a single entry, but possible uncertainty as to the exact burglarious intent, that uncertainty would

[7] Here, the court instructed the jury: "Your verdict on each count and any special findings must be unanimous. This means that, to return a verdict, all of you must agree to it."

involve only the theory of the case and not require the unanimity instruction. (*People v. Failla* (1966) 64 Cal.2d 560, 567-569.)" (*Russo, supra*, 25 Cal.4th at pp. 1132-1133.)

Here, the court instructed the jury on the elements of burglary as follows: "In order to prove the defendant is guilty of [first-degree burglary], the People must prove the following two elements: [¶] One, that the defendant entered an inhabited house – and remember you're going to get these in writing. [¶] Two, when he entered the inhabited house, he intended to commit one or more of the following felonies, and there are four: [¶] One is murder; [¶] Two, infliction of corporal injury on his child's mother; [¶] Three, forcible sexual penetration; or [¶] Four, kidnapping. [¶] So when he entered an inhabited house, he intended to commit one or more of those crimes. [¶] A house is inhabited if somebody uses it as a dwelling, whether or not somebody was actually inside at the time of the entry. [¶] To decide whether the defendant intended to commit one of those listed felonies, please refer to the separate instructions that I'm going to give you on those crimes. [¶] A burglary was committed if the defendant entered with the intent to commit one of those listed felonies. The defendant does not need to have actually committed one of those felonies, as long as he entered with the intent to do so."

Appellant contends that the burglary verdict could have been based on three different entries: (1) appellant's entry into the house itself, or (2) his entry into Jane Doe Two's bedroom, or (3) his entry into Jane Doe One's bedroom. Appellant bases his argument on the charging language of the information, which alleged that appellant entered an "inhabited dwelling house and trailer coach and inhabited portion of a building occupied by JANE DOE ONE, with the intent to commit larceny and any felony." He also relies on a question submitted to the court by the jury during its deliberations: "Please provide a definition of the word 'intent' under charge #3 under your instructions for element #5. Is 'intent' when he the Defendant entered the home? Or when he was in Jane Doe II's bedroom? Did intent have to come before he entered the house?" Appellant contends that the jury must have been aware that the specific intent needed for burglary may be harbored either during entry of the residence or during entry of a room

within. The jury's consideration of different entries and different accompanying intents rendered it likely, according to appellant, that the burglary verdict was based on different acts. We disagree.

First, the only act alleged by the prosecution as the basis of the burglary charge was appellant's entry into the house. There is no support for appellant's contention that "[t]he four various intents charged in the information allowed the jury to consider several entries shown by the evidence at trial." Our review of the jury instructions, closing arguments by the prosecution and defense counsel, and the verdict forms themselves indicates that the court and counsel below consistently referred to the house as the relevant entry point for the burglary charge and the enhancements based on first-degree burglary.

Second, although it is a correct statement of the law that the specific intent for burglary may be harbored during the entry of a residence or during a subsequent entry into a room within the residence (see, e.g., *People v. Sparks* (2002) 28 Cal.4th 71, 73 [entry into a bedroom with intent to commit rape can support a burglary conviction even if the intent was not formed until after defendant entered the home]), there was no evidence at trial that appellant's intent to commit a felony within Jane Doe One's house did not arise until after he had entered the home.

Third, the jury's question had nothing to do with the burglary charge. Rather, it pertained to count three, assault with intent to commit sexual penetration with a foreign object while in the commission of a first-degree burglary, a violation of section 220, subdivision (b). The jury requested clarification of element number five of the court's instruction, intent.[8] Specifically, it appears from the question that the jury was unclear

[8] The court instructed the jury on six elements for this offense: (1) "The defendant did an act that, by its nature, would directly and probably result in the application of force to another person;" (2) "he did that act willfully;" (3) "when he acted, the defendant was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone;" (4) "when the defendant acted, he had the present ability to apply force to another person;" (5) "when

about the timing of the intent to commit sexual penetration. However, because the record contains no discussion among the court and counsel regarding the inquiry, nor the court's response to the jury, any discussion along these lines would be mere speculation.

Fourth, appellant cites no evidence in the record that the jury was even aware of the charging language of the information, much less that they construed it to mean that there were several possible entries to consider.

However, even if a unanimity instruction were required, the failure to give such an instruction was harmless error under either *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) (an error is harmless only if the court determines it was harmless beyond a reasonable doubt) or *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) (an error is harmless only if it is not reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error). At trial, appellant admitted going to Jane Doe One's house that day to take John Doe away. The jury disbelieved appellant's claim that he believed the boy was in imminent danger, and found him guilty of kidnapping. By appellant's own admission and testimony, his intent to take the boy arose before he, appellant, entered the house. Thus, it is not reasonably probable that appellant would not have been found guilty of burglary if the jury had been given the unanimity instruction. (*Watson*, *supra*, 46 Cal.2d at p. 836.) Moreover, the failure to give a unanimity instruction, even if error, was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.)

B. Prosecutorial Misconduct.

Appellant contends the prosecutor engaged in misconduct during his closing argument by referring to facts outside the record, making comments directing blame at appellant and his attorney, and making an inappropriate religious reference. He argues that the cumulative effect of these comments deprived him of a fair trial. We disagree.

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he acted, he intended to commit an act of sexual penetration with a foreign object;" and (6) "when he committed the act, it occurred in the commission of a first-degree burglary."

" ' "The applicable federal and state standards regarding prosecutorial misconduct are well established. ' "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' (*People. v. Espinoza*, *supra*, 3 Cal.4th at p. 820.)" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)' (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

"Regarding the scope of permissible prosecutorial argument, ' " 'a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.' [Citation.] 'A prosecutor may "vigorously argue his case and is not limited to 'Chesterfieldian politeness' " [citation], and he may "use appropriate epithets . . . ." ' " (*People v. Wharton* [(1991)] 53 Cal.3d [522,] 567-568.)' (*People v. Williams* (1997) 16 Cal.4th 153, 221.)" (*People v. Stanley* (2006) 39 Cal.4th 913, 951-952.)

"To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner." (*People v. Frye* (1998) 18 Cal.4th 894, 970, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

1. *Comments regarding lack of evidence of injuries to John Doe*.

Appellant's defense to kidnapping was his claimed belief that John Doe was in imminent danger. Appellant testified that he saw injuries on John Doe during his

supervised visits at Terra Firma and that he reported the injuries to Child Protective Services (CPS) and the director of Terra Firma. Appellant told the jury that CPS did not investigate because CPS considered his report to be "sour grapes" due to his arrest and the pending charges against him. Appellant said he did not go into specifics with the director of Terra Firma and that he did not show that person, whose name he could not recall, the injuries to John Doe because it was against the rules to take the boy out of the supervised visiting area.

In disputing appellant's version of events, the prosecutor argued: "Not once did you hear that John Doe went to the hospital. Not once. If the abuse was that bad, you would have heard him going to the hospital. There would have been some medical records here. No, there weren't any. He goes to school. There's no evidence that anyone at school saw the abuse. Wouldn't you think that if he's got stuff all on his neck, welts—." Defense counsel objected and the trial court overruled the objection. The prosecutor continued: "Wouldn't you think, what do teachers do? What does child protective services do? If welts—and that boy had injuries on him, you would have heard about it other than from the defendant. His self-serving statements. He was not in imminent danger." Shortly thereafter, the prosecutor argued that supervised visits included a neutral third party in the room during the visit who could have testified as to any injuries.

Appellant contends the prosecutor "was allowed to insinuate that there were facts outside the record that would rebut the defense case such as that there was a process for reporting injuries that would have investigated any injuries to John Doe . . . ."

We have reviewed the record and conclude the prosecutor's comments were fair comment on the evidence. It was not inappropriate for the prosecutor to point out that, despite appellant's stated fear for his son's safety, there was no evidence of any injuries other than appellant's testimony—no other witnesses or documentation. Moreover, it is common knowledge and common sense that teachers and CPS workers would not ignore

any such injuries, had they seen them.[9] Similarly, arguing that supervised visitation involves the presence of a third party, i.e., the supervisor of the visit, is merely pointing out the obvious.

2. *Comments regarding John Doe's behavior toward his mother*.

The prosecutor recounted appellant's testimony that John Doe knocked Jane Doe One to the ground twice during the events of November 9, 2006, and then argued to the jury: "Now, common sense tells you domestic violence and abuse of women, that's learned behavior. Where would he learn to knock his mother down twice? Where would he learn to knock down a woman twice?" The court overruled appellant's counsel's objection that this was improper argument. The prosecutor then continued: "That's learned behavior. A six-year-old knocking down his mother, where did he get that from? Think about it. If he hadn't been abusive to her in the past, where would he learn it? Where would he have seen it? He wouldn't. A six-year-old boy doesn't just attack his mother without getting that from someplace. He has an answer to everything or for everything, but they were unreasonable answers."

Appellant argues that the prosecutor again suggested the existence of facts outside the record, this time that John Doe had seen his father abuse his mother "on earlier occasions and with regularity, events not included in the testimony at trial."

Based on the evidence, it was not improper for the prosecutor to suggest that John Doe had learned the behavior. Jane Doe One testified that, in addition to the May 23, 2006 incident, appellant physically abused her on a number of prior occasions as well. At a minimum, John Doe witnessed his father abuse his mother on May 23, 2006. In addition, it is common knowledge that children learn behavior at home, from their parents. It was reasonable for the prosecutor to argue that when John Doe pushed his mother down, he was only doing what he had seen his father do in the past.

[9] Indeed, it is arguably common knowledge that teachers and social workers have a duty to report suspected child abuse. (§§ 11165.7, 11166.)

3. *Comments regarding Jane Doe Two's ordeal in the hospital and in court.*

Appellant also complains that the prosecutor made reference to facts outside the record and blamed him and/or his attorney for causing anguish to Jane Doe Two. Appellant's defense at trial to the sexual penetration charges was that they never happened, that Jane Doe Two fabricated them. Rebutting that testimony, the prosecutor argued, "Why would a 14-year-old girl, 16, 17, anybody put themselves through that? Especially if you're that young, no one would do that. She has to report to the police. She gives a statement. She has to testify twice. You're not going to go through all that for a lie. You're just not."

Appellant's contentions have no merit. First, because there was no objection to these portions of the closing argument, the claim of misconduct was forfeited. (*People v. Williams* (2010) 49 Cal.4th 405, 464.) Second, appellant's contention notwithstanding, the evidence at trial established the facts that Jane Doe Two was 14 when the incident occurred and she was 17 at the time of the trial; she gave a statement to the police; and she testified at both the preliminary hearing and trial. Thus, the prosecutor's remarks were fair comment on the evidence. Third, we discern no suggestion that appellant and/or his counsel were "villains" or that it was his or their "fault that Jane Doe 2 had to testify twice—as opposed to the prosecution's election not to proceed by way of Proposition 115 . . . ." Appellant points to nothing in the record to support the notion that the jury blamed him for legal proceedings that required Jane Doe Two to testify at both the preliminary hearing and trial.

Nor do we agree with appellant's contention that subsequent comments by the prosecutor describing Jane Doe Two's sexual assault exam "inferred it was appellant's fault that invasive techniques were used by the administration of justice to collect evidence that they hoped would help to convict appellant." There was nothing improper in the prosecutor's attempt to undermine appellant's credibility by arguing to the jury that, in light of the consequences to herself, it was unlikely Jane Doe Two had lied about the sexual penetrations.

4. *Reference to religion*.

Finally, appellant contends the prosecutor committed misconduct by invoking religion when he told the jury: "Ralph Baldenegro deserves to die in hell if he just taped her up and let her be. She wouldn't be making these statements. She just wouldn't."[10] Appellant contends this was a reference to "religion and morality" and, as such, "distracted from the issues at trial."

In further arguing that Jane Doe Two did not lie about the digital penetrations, the prosecutor referred to her 911 call. He reminded the jury that it had heard the call, argued that it was apparent from the call that Jane Doe Two was hysterical and not faking, and then repeated several of her statements during the call including, "he did horrible things to me" and he "deserves to die in hell."

Appellant did not object to the remark at trial and thus has forfeited the misconduct claim on appeal. (*People v. Williams* (2010) 49 Cal.4th 405, 464.) The claim also lacks merit. Even assuming the brief reference to "hell" was a religious reference, it was not an appeal to a religious authority or to the jury's religious passions or prejudices, and there was no attempt to diminish the jury's sense of responsibility to follow the trial court's instructions. (See *People v. Brady* (2010) 50 Cal.4th 547, 587; *People v. Hill* (1998) 17 Cal.4th 800, 836-837; *People. v. Williams* (1988) 45 Cal.3d 1268, 1325, abrogated on other grounds as stated in *People v. Guinan* (1998) 18 Cal.4th 558, 569.) Moreover, "there is no reasonable likelihood the jury applied the remark[] in an objectionable fashion." (*People v. Brady*, *supra*, 50 Cal.4th at p. 587.)

5. *Cumulative effect*.

Appellant argues that the cumulative effect of the complained-of remarks deprived him of a fair trial. We disagree. Having found no error as to any individual claim of

[10] Appellant points out that the punctuation in the transcript of these statements is probably incorrect, and suggests: "Ralph Baldenegro deserves to die in hell. If he just taped her up and let her be, she wouldn't be making these statements. She just wouldn't." Appellant also notes that "the difference is more material to understandability than to the biblical reference."

misconduct, we also find no cumulative prejudice. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1382; *People v. Mayfield* (1997) 14 Cal.4th 668, 809.)

C. *Sufficiency of the Evidence of Intent for Robbery*.

Appellant contends the evidence was insufficient to establish the element of intent necessary for a robbery conviction. He argues there was no evidence that he intended to permanently deprive Gregory McClain of his cell phone. Rather, according to appellant, the evidence showed only that he intended to prevent McClain from calling the police. He contends that his conduct was a violation of section 591.5,[11] but not a robbery.

In reviewing a challenge to the sufficiency of the evidence, the appellate court must " 'consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt.' [Citation.] We consider whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citations.]" (*People v. Romero* (2006) 140 Cal.App.4th 15, 18.) In making this determination, we do not reweigh the evidence; the credibility of witnesses and the weight to be accorded to the evidence are matters exclusively within the province of the trier of fact. (Evid. Code, § 312.) Thus, if the evidence permits a reasonable trier of fact to conclude the charged crime was committed, the opinion of a reviewing court that the circumstances may also be reconciled with a contrary finding will not warrant reversal. (See *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.) Unless it is clearly shown that "on no hypothesis whatever is there sufficient substantial evidence to support the [jury's] verdict," we will not reverse. (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429.)

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[11] Section 591.5 provides: "A person who unlawfully and maliciously removes, injures, destroys, damages, or obstructs the use of any wireless communication device with the intent to prevent the use of the device to summon assistance or notify law enforcement or any public safety agency of a crime is guilty of a misdemeanor."

To prove a robbery, the prosecution must establish that the defendant took property from the victim "by means of force or fear with the specific intent to permanently deprive him [or her] of that property." (*People v. Young* (2005) 34 Cal.4th 1149, 1176-1177; § 211.) The evidence must show that the requisite intent to steal arose either before or during the commission of the act of force. (*People v. Tafoya* (2007) 42 Cal.4th 147, 170.) (.) "[T]he intent required for robbery . . . is seldom established with direct evidence but instead is usually inferred from all the facts and circumstances surrounding the crime. [Citations.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 643; *People v. Edwards* (1992) 8 Cal.App.4th 1092, 1099 [" '[I]ntent is inherently difficult to prove by direct evidence. Therefore, the act itself, together with its surrounding circumstances must generally form the basis from which the intent of the actor may legitimately be inferred.' [Citation.]"].)

As the Supreme Court explained in *People v. Avery* (2002) 27 Cal.4th 49, 55 (*Avery*), the phrase "intent to permanently deprive" is not intended literally, but is merely a shorthand was of describing the intent to steal. The *Avery* court cited examples, including when the nature of the property is such that even a temporary taking will deprive the owner of its primary economic value, such as goods that are dated or perishable; and when the defendant takes property with the intent to use it and then abandon it in circumstances making it unlikely that the victim will recover it. (*Avery, supra,* 27 Cal.4th at pp. 55-56, citing *People v. Davis* (1998) 19 Cal.4th 301, 307-308.) Thus, the intent to permanently deprive can arise when the defendant asserts control over the property in a manner that creates a substantial risk of permanent loss. (*People v. Davis, supra,* 19 Cal.4th at p. 309; *People v. Mumm* (2002) 98 Cal.App.4th 812, 819.)

Contrary to appellant's assertions, the evidence supports a reasonable inference that appellant intended to steal McClain's cell phone. McClain testified that he called 911 and was on hold when appellant pointed a gun at his head and demanded his cell phone. McClain gave him the phone but pointed out that other people were also calling 911. Appellant then threw the cell phone about 30 feet away into a bush. The jury could

have reasonably inferred that appellant initially intended to permanently deprive McClain of his cell phone, but instead threw the phone and hastily fled with John Doe upon realizing that the arrival of the police was imminent. The fact that McClain later recovered his phone does not negate the reasonable inference that at the time appellant demanded the phone at gunpoint and took it, it was appellant's intention to deprive McClain of it permanently. (See *People v. Carroll* (1970) 1 Cal.3d 581, 584 [although the defendant discarded the wallet when he realized it was empty, it was reasonable to infer that when he took the wallet he intended to deprive the owner of it permanently]; see also *In re Albert A.* (1996) 47 Cal.App.4th 1004, 1008 ["[T]he return of property previously taken does not compel the conclusion that a defendant intended only to temporarily deprive the owner of the property. [Citations.]"].) Drawing all reasonable inferences in favor of the judgment, the specific intent to deprive McClain of his cell phone permanently is supported by substantial evidence.

D. *Consecutive Sentences.*

Appellant contends the trial court erred in sentencing him to full consecutive terms on counts 4, 5, and 6 (the three forcible sexual penetrations of Jane Doe Two) because the sexual penetrations did not take place on separate occasions. Rather, he argues that the three digital penetrations were part of a continuous sexual assault and thus he had no meaningful opportunity for reflection, as required by section 667.6, subdivision (d).

In sentencing appellant on these offenses, the trial court stated: "The jury found, in finding the defendant guilty of those offenses, they found that he committed separate – three separate and distinct acts of digital penetration of Jane Doe Two. And it appears to me that each of those added to and exacerbated, increased the emotional trauma and impact on the young lady. For that reason, I feel that it's appropriate to order those sentences to run consecutive with one another. So counts four, five, and six will run consecutive to each other."

Section 667.6 requires full consecutive terms for each commission of certain sex crimes, including forcible sexual penetration in violation of section 289, subdivision (a),

as charged in counts 4, 5, and 6, "if the crimes involve separate victims or involve the same victim on separate occasions." (§ 667.6, subd. (d).) The statute further provides: "In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions." (§ 667.6, subd. (d); see also *People v. Jones* (2001) 25 Cal.4th 98, 104 [a finding that the defendant committed the crimes on separate occasions "does not require a change in location or an obvious break in the perpetrator's behavior"].)

We review a trial court's finding that the sex offenses were committed on separate occasions within the meaning of section 667.6, subdivision (d), under a "deferential standard;" we will reverse "only if no reasonable trier of fact could have decided the defendant had a reasonable opportunity for reflection after completing an offense before resuming his assaultive behavior." (*People v. Garza* (2003) 107 Cal.App.4th 1081, 1092.)

Appellant contends the facts produced at trial did not support three full and consecutive life terms because the digital penetrations were committed as "one continuous episode without a pause to permit appellant a 'reasonable opportunity to reflect upon his . . . actions.' " Appellant likens his case to *People v. Pena* (1992) 7 Cal.App.4th 1294, in which the defendant raped the victim, got off of her, twisted her violently by the legs, and then orally copulated her. The trial court found that the change of position after the rape provided the defendant with a reasonable opportunity to reflect and sentenced him consecutively, but the appellate court disagreed, finding that the sexual assault was continuous.

Appellant also argues that the circumstances in this case did not provide sufficient opportunity to reflect because there was no break or interruption of sexually assaultive conduct. He emphasizes this distinction in *People v. King* (2010) 183 Cal.App.4th 1281, 1325, in which the defendant, who sexually assaulted the victim under the ruse that he was a police officer performing a lawful search, removed his fingers from her vagina when he saw lights and a car drive by; after pausing and looking around uneasily, he inserted the fingers of his other hand into her vagina in a separate assault. Similarly, in *People v. Garza*, *supra*, 107 Cal.App.4th at p. 1092, the defendant forced the victim to orally copulate him, then let go of her neck, ordered her to remove her clothes, punched her in the eye, put his gun to her head threatening to shoot her, and then removed his own clothes before resuming the sexual assault. Finally, in *People v. Plaza* (1995) 41 Cal.App.4th 377, 384-385, after forced oral copulation in the victim's bathroom, the defendant then forced the victim into the bedroom and digitally penetrated her vagina; he then paused to listen to the victim's answering machine and punched three holes in the wall before committing another act of forced oral copulation; after slapping her face and verbally abusing her for about five minutes, he then kicked her legs apart and raped her. In contrast to these cases, appellant contends his assault on Jane Doe Two was continuous and uninterrupted.

Our Supreme Court has made clear that section 667.6, subdivision (d), establishes a "broad standard" for determining whether the crimes in question occurred on separate occasions, and noted that "the Courts of Appeal have not required a break of any specific duration or any change in physical location." (*People v. Jones*, *supra*, 25 Cal.4th at p. 104. Every case turns on its particular facts. (*People v. Corona* (1988) 206 Cal.App.3d 13, 17.)

Here, the evidence showed not only that appellant had a reasonable opportunity to reflect, but also that he did in fact reflect upon what he was doing. While Jane Doe Two was lying bound and nearly naked on the bed, appellant gathered various items onto her bedside table. After the first penetration, which lasted for some minutes, he rubbed her

genital area with what felt like lotion before reinserting his finger and moving it around inside her again. He then used a vibrating device on her externally before digitally penetrating her vagina a third time. While he was touching her, appellant talked to Jane Doe Two, asking her if it felt "weird," asking whether people at school had done this to her, and telling her repeatedly that her mother was to blame for what he was doing. This was not a frenzied, impulsive, or violently agitated attack; it was a calm, deliberate, and calculated series of assaults apparently intended to humiliate and punish a child for the perceived wrongs of the mother. Appellant prepared for and considered each of his actions, necessarily reflecting on his behavior as he asked Jane Doe Two how it felt and whether she had done it before, all the while reminding her to blame her mother.

Moreover, although he did not interrupt his sexual abuse of Jane Doe Two to change location or engage in some non-sexual activity before "resum[ing] sexually assaultive behavior" (§ 667.6, subd. (d)), the evidence is clear that there were significant intervals after the first and second digital penetrations during which appellant had ample opportunity to reflect, and did expressly reflect, before penetrating her vagina the second and third times. There was no error in the imposition of consecutive sentences.

IV. DISPOSITION

The judgment is affirmed.

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Haerle, Acting P.J.

We concur:

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Lambden, J.

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Richman, J.