

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JULY TERM 2013

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

RAUL ROSADO,

Appellant,

v.

Case No. 5D12-4257

STATE OF FLORIDA,

Appellee.

_____ /

Opinion filed October 18, 2013

Appeal from the Circuit Court
for Orange County,
Margaret Schreiber, Judge.

James S. Purdy, Public Defender,
and John M. Selden, Assistant
Public Defender, Daytona Beach,
for Appellant.

Pamela Jo Bondi, Attorney
General, Tallahassee, and Ann
M. Phillips, Assistant Attorney
General, Daytona Beach, for
Appellee.

PER CURIAM.

Raul Rosado appeals from the judgment and sentence entered after he was adjudicated guilty of kidnapping with intent to inflict bodily harm or terrorize, burglary of a conveyance with an assault, carjacking, aggravated battery causing great bodily harm, aggravated assault with an intent to commit a felony, and two counts of

misdemeanor battery following a jury trial. On appeal, he argues that: (1) his convictions for both burglary with an assault and aggravated assault with an intent to commit a felony violate the prohibition against double jeopardy; (2) his convictions for aggravated battery and two counts of misdemeanor battery violate the prohibition against double jeopardy; and (3) the trial court imposed a vindictive sentence in sentencing him to forty years' imprisonment. We affirm in part and reverse in part.

In the early morning hours of July 21, 2008, the victim was parked in a parking lot beneath the I-4 overpass in downtown Orlando when a man she did not recognize approached her car. The man eventually convinced the victim to give him a ride to Orange Blossom Trail. During the car ride, the man pressed something against the victim's side, demanding that she do as he said. The victim did not know what was pressed against her, but she feared that it was a gun. The man ordered the victim to turn onto the next side street and pull over, and she complied. Once the car was stopped, she told the man to get out, but he refused. When the victim attempted to exit the car, the man punched her in the face. She tried to reach for the door handle again, but the man choked her and hit her several times. He ordered her to push the driver's seat back, but she refused. The man then reclined her seat and demanded that she remove her pants and underwear. The man digitally penetrated her and continued to hit and choke her as she struggled. The victim eventually was able to escape from the car, at which point the man jumped into the driver's seat and sped off.

The victim flagged down assistance, law enforcement was called, and she was transported to the hospital. Law enforcement located the victim's car the next day and processed it for evidence, but the case remained cold for over two years.

In 2010, the Orange County Sheriff's Office received a tip identifying Rosado as the victim's attacker. Detectives showed the victim a photographic line-up and she identified Rosado as her attacker. Based upon the victim's identification, the Sheriff's Office obtained a warrant for Rosado's DNA and determined that his DNA matched the DNA found on the victim's body and in her car. Rosado's fingerprints were also found on the car.

The State filed an information charging Rosado with: (1) sexual battery with a deadly weapon or physical force; (2) kidnapping with intent to inflict bodily harm or terrorize; (3) burglary of a conveyance with an assault; (4) carjacking; (5) aggravated battery causing great bodily harm; (6) aggravated assault with intent to commit a felony; and (7) felony battery. The jury found Rosado guilty as charged on counts two through seven. As to the sexual battery charge, the jury found Rosado guilty of the lesser-included offense of battery. At the sentencing hearing, the State announced that it would not go forward with attempting to prove Rosado's prior battery conviction for the purposes of establishing felony battery. Accordingly, the trial court adjudicated Rosado guilty of misdemeanor battery on count seven.

On appeal, Rosado argues that some of his convictions violate the prohibition against double jeopardy.¹ As to the convictions for both burglary with an assault and aggravated assault with intent to commit a felony, the State concedes error. Accordingly, we vacate Rosado's conviction for aggravated assault with intent to commit a felony.

¹ Although Rosado did not raise these issues below, they are nevertheless cognizable on appeal because a double jeopardy violation constitutes fundamental error. See State v. Johnson, 483 So. 2d 420, 422 (Fla. 1986) (citing Benton v. Maryland, 395 U.S. 784, 794-96 (1969)).

Rosado further submits that his convictions for aggravated battery causing great bodily harm and two counts of misdemeanor battery also violate the prohibition against double jeopardy. We agree. See Olivard v. State, 831 So. 2d 823, 824 (Fla. 4th DCA 2002) (holding that dual convictions for battery and aggravated battery causing great bodily harm violated double jeopardy principles where defendant committed battery and aggravated battery against same victim, in same location, and defendant's actions "were within the course of one continuous episode attacking [the victim]"); see also Arnold v. State, 514 So. 2d 419, 421 (Fla. 2d DCA 1987) ("The battery is a necessarily included lesser offense of the aggravated battery, and the constitutional protection against double jeopardy prohibits separate convictions and sentences."). We therefore vacate Rosado's two misdemeanor battery convictions.

As to Rosado's claim of vindictive sentencing, he failed to object during the sentencing hearing and has not challenged his sentence in a motion filed pursuant to Florida Rule of Criminal Procedure 3.800(b). Consequently, he cannot raise the alleged sentencing error on direct appeal. See Brannon v. State, 850 So. 2d 452, 456 (Fla. 2003) ("[F]or defendants whose initial briefs were filed after the effective date of rule 3.800(b)(2), the failure to preserve a fundamental sentencing error by motion under rule 3.800(b) or by objection during the sentencing hearing forecloses them from raising the error on direct appeal."); Allende v. State, 882 So. 2d 472, 473 (Fla. 5th DCA 2004) (rejecting argument that vindictive sentence constituted fundamental error that can be raised for first time on direct appeal and explaining that rule 3.800(b) "must be used to preserve both fundamental and non-fundamental sentencing errors"). Accordingly, we affirm the sentence imposed by the trial court.

AFFIRMED IN PART; REVERSED IN PART.

TORPY, C.J., ORFINGER and COHEN, JJ., concur.