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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JULIO ROMERO GARZA, Defendant and Appellant.	C039029 (Super. Ct. Nos. 00F06979, 98F07051)

APPEAL from a judgment of the Superior Court of Sacramento County, Roland Candee, J. Affirmed.

John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Senior Assistant Attorney General, John G. McLean, Supervising Deputy Attorney General, and Aaron R. Maguire, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to rule 976.1 of the California Rules of Court, this opinion is certified for publication with the exception of parts I through VII of the DISCUSSION.

In a case arising out of defendant Julio Garza's sexual assault on Cynthia R. on August 23, 2000, a jury convicted defendant on 18 felony counts: kidnapping for rape (count 1; Pen. Code, § 209, subd. (b)(1); all further undesignated section references are to the Penal Code), forcible oral copulation (counts 2-6; § 288a, subd. (c)(2)), forcible rape (counts 7-14; § 261, subd. (a)(2)), forcible digital penetration (count 15; § 289, subd. (a)(1)), sexual battery (count 16; § 243.4, subd. (a)), false imprisonment (count 17; § 236), and assault with a firearm (count 18; § 245, subd. (a)(2)). The jury also found that defendant personally used a firearm as to all counts. Finally, the jury found as to counts 2 through 15 that defendant kidnapped the victim for the purpose of committing rape, forcible oral copulation, or digital penetration, and substantially increased the risk of harm to the victim over and above that necessarily present in the underlying crime. (Cf. § 667.61, subds. (a), (d).)

The trial court sentenced defendant to a total term of 54 years and eight months to life in state prison. The term was computed as follows: on count 2 (forcible oral copulation), the court imposed an indeterminate life sentence with a minimum of 25 years served before parole eligibility. (§§ 288a, subd. (c)(2); 667.61, subds. (a), (b), (e).) On counts 3 (forcible oral copulation), 7 (rape), and 15 (forced digital penetration), the court imposed consecutive determinate aggravated terms of

eight years, plus 10 years for the firearm use enhancements. (§§ 288a, subd. (c)(2); 261, subd. (a)(2); 289, subd. (a)(1); 12022.53, subd. (b).) On counts 4 through 6, the remaining forcible oral copulation counts and firearm use enhancements, the court ran the 18-year sentences concurrent to that on count 3; similarly, on counts 8 through 14, the remaining rape counts and firearm use enhancements, the court ran the 18-year sentences concurrent to that on count 7. The court stayed execution of sentence on count 1 (kidnapping to commit rape) pursuant to section 209, subdivision (d), which bars punishment for that offense where an enhancement is imposed under section 667.61 for rape; the court also stayed execution of sentence on counts 16 through 18 pursuant to section 654. Finally, the court revoked defendant's probation in a prior case (case No. 98F07051B) and imposed an eight-month consecutive sentence for violation of Vehicle Code section 10851, subdivision (a).

Defendant contends: (1) The admission of propensity evidence under Evidence Code section 1108 violated defendant's federal constitutional rights to due process and equal protection. (2) The evidence should have been excluded under Evidence Code section 352 as unduly prejudicial. (3) Insufficient evidence supports defendant's convictions on counts 2 through 6 and 7 through 14. (4) The trial court erred prejudicially by restricting defendant's right under the Sixth Amendment to the United States Constitution and Evidence Code section 782 to present evidence and cross-examine the victim as

to whether the sperm found in her vagina during the sexual assault examination was deposited during intercourse with another person on the morning of August 22, 2000. (5) The trial court erred prejudicially by instructing the jury on flight (CALJIC No. 2.52). (6) The trial court erred prejudicially by instructing the jury with CALJIC No. 17.41.1. (7) The cumulative prejudice from the trial court's errors compels reversal. (8) Consecutive sentencing on counts 3, 7, and 15 was not mandatory under section 667.6, subdivision (d), as the trial court thought; therefore the matter must be remanded for resentencing.

In the published portion of the opinion, we shall conclude the trial court lawfully sentenced defendant. In the unpublished portion of the opinion, we reject defendant's other contentions of prejudicial error. We shall therefore affirm the judgment.

FACTS

Prosecution case

On August 23, 2000, the 19-year-old victim was visiting a friend at an apartment complex in north Sacramento. Between 11:30 p.m. and 1:00 a.m., she accepted a ride from defendant, whom she knew, to take her to Michelle Diaz's apartment in the complex, where she was staying.

After defendant started driving toward Diaz's apartment, he asked the victim to buy him cigarettes, claiming he did not have his identification with him. She said she also did not have

identification, but he insisted the store would sell her cigarettes anyway.

As defendant drove on (having passed Diaz's apartment), he talked about his financial problems and his girlfriend's pregnancy. Then he displayed a gun. When the victim asked why he had one, he ordered her to take her clothes off, then said he was just kidding. He did this two or three times. At first she thought it was a joke, but then she became scared, started crying, and asked him to take her home.

Instead, defendant drove past an AM/PM market on Watt Avenue and parked near a warehouse, remote from the street or any passersby. The victim asked: "What [are] we doing here[?]" Defendant replied: "I brought you here to fuck you."

Defendant ordered the victim to "go down on" him. She asked him not to make her do that because she had never done it before. He grabbed the back of her neck, pointed the gun at her, and told her to "suck [his] dick." He said if she did that he would not force her to have sex with him. Then he pulled her head toward his lap and forced her to put his penis in her mouth as he held the gun to the back of her head. When she tried to pull back, he pressed the gun against her head and said: "[K]eep doing it or I'm going to shoot you." Defendant forced her to orally copulate him six or seven times.

Letting go of the victim's neck, defendant ordered her to take off her clothes. When she refused, he punched her in the left eye, then put the gun to her temple and threatened to shoot

if she did not comply. She and defendant got undressed. Reclining the passenger seat, defendant got on top of her.

Defendant put his finger in the victim's vagina. Then he began to "play" with her chest. He then put his gun on the back seat, pulled the victim's legs around his shoulders, and forced his penis inside her vagina. Crying, she told him to stop or at least to use a condom; he put his hand over her mouth and said "Shut up." He removed and reinserted his penis about eight times, then ejaculated.

After defendant and the victim dressed, he began driving back to the apartment complex. He told her: "If I find out that you have blood on my car, I'm going to come back and beat the shit out of you." She promised not to call the police or say anything to anyone if he took her home. Before letting her out, he apologized, saying "I could have killed you . . . and I didn't."

Once inside Michelle Diaz's apartment, the victim broke down crying, told Diaz what happened, then went into the bathroom and vomited. Diaz called Krista Armstrong and Herman Ramey, friends of the victim, who came over. When the police came in response to a 911 call, they took the victim to UC Davis Medical Center for a sexual assault examination.

The victim reported that she had been forced at gunpoint to perform oral copulation, forcibly penetrated with a finger, and raped. The examiner found the victim's genitals and labia very tender and her cervix blood-streaked; the victim also suffered

from a bruise around her left eye consistent with being hit in the face, and tenderness in the back of her head. All findings were consistent with sexual assault.

After the police took defendant into custody in the early morning of August 23, 2000, he waived his rights against self-incrimination and spoke to an officer in a videotaped interview. At first he denied that anything had happened: he had merely driven the victim to the AM/PM market and back to the apartment complex. Later he said he had talked to the victim about his problems, then parked by a warehouse and asked her to have sex with him; she agreed and they had consensual sex. He admitted taking out a .38 caliber snubnose revolver earlier and waving it around. After mentioning the gun, he first claimed he had taken it to a friend's house after dropping the victim off, then admitted he had thrown the gun and a bag full of bullets out the car window after he saw a marked police car turn around behind him.

The detective left defendant alone to write to the victim. Defendant wrote and signed the following: "Dear Cynthia, I'm writing this letter to say that I am sorry for putting you through what I did that night. I am sorry for putting a gun to your head and making you do something that you didn't want to do. I would also like to say thank you for calling the cops on me because hopefully now I can get some help. But once again, I am really, really sorry for hurting you and I mean that from the heart."

Later that morning, defendant directed the police to the spot where he had thrown out the gun and bullets. The police could not find the gun, but found two .38 caliber bullets.

Defense case

Testifying on his own behalf, defendant stuck to his last story to the police: the sexual acts with the victim were consensual, although he "pushed her into doing it" by telling her he would be her boyfriend and take care of her.

According to defendant, he and the victim had flirted in the past; thus, when he had the chance to pick her up on the night of August 23, 2000, he thought he would take the opportunity to talk to her. When he picked her up, he told her he wanted to go buy cigarettes, then started flirting; she reciprocated.

They drove to the AM/PM and made purchases. Driving away, he asked if the victim would mind stopping and talking; she said she wouldn't, so he parked by a warehouse.

He told the victim he "would treat her right" and complained of money problems. He asked her if he could kiss her; she said she didn't care. He kissed her and she responded.

When he asked the victim if they could have sex, she said she "wasn't that type of girl." However, when he resumed kissing her and started rubbing his hands on her, she did not protest. He unbuttoned her shorts and started rubbing her down there, then asked again if they could have sex.

Defendant asked the victim if she ever "went down on somebody"; she said she did not do that. He told her to try it once and she did, but after he put his penis in her mouth she got up and said she did not like it and could not do it anymore.

After that, they stripped. At defendant's request, the victim leaned back in the passenger seat. He climbed over, and they had sex. Defendant penetrated her vagina only once. She asked him to slow down, but did not scream or ask him to stop. He never hit her. After a while, he stopped because he felt disgusted.

Getting out of the car, defendant began arguing with the victim. She asked "[W]here do we stand at?" He said "[N]owhere," adding that he had a child on the way. She called him a dog; he called her dirty and a bitch.

Defendant drove the victim back to the apartment complex, apologizing for his name-calling on the way. As she got out, she said he was "no good" and "just like all the rest of them." She then asked "[W]ho gets the last laugh?" He sarcastically invited her to call the cops.

After dropping the victim off, defendant went to get something to eat. An hour later, he got a page from Renee Armenta, the victim's cousin; when he returned the call, Armenta asked him "[W]hat did you do to my cousin?" Krista Armstrong got on the phone and told defendant that the victim had said he raped her. Defendant told Armstrong she had known him for 13

years and knew he would never do such a thing.[1] He then said he would call her right back.

Defendant drove to another woman's house, then called Armenta and Armstrong back. They told him the police were there; he said he would return and asked them to keep the police there. En route to the apartment complex, he threw his gun and bullets out the car window. The police stopped him inside the entrance to the complex.

Defendant tried to explain away incriminating evidence from his police interview and his letter to the victim. Although he never hit her or waved a gun at her, he falsely told the police he had done so because he was tired of being questioned. His letter was an apology for talking her into having sex with him. He said in the letter he had put a gun to her head and forced her because the police told him to include that in the letter. When he thanked her in the letter for calling the police, he was being sarcastic.

Rebuttal

R. testified that she met defendant when she was 13 and they went together for the next four years. On July 4, 1996, defendant put four bullets into a five-shot revolver, spun the cylinder, put the gun next to her temple, and pulled the trigger; she heard a click. She told him she did not want to be with him anymore; he told her to shut up and said she wasn't

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[1] On cross-examination, defendant denied having raped R. in 1996.

going anywhere until she had sex with him. He pushed her onto the floor, slapped her face, pulled off her pants, and raped her. She had not reported the crime because he told her he would kill her if she mentioned it to anyone. She denied having communicated with defendant by telephone or mail in 1997 while he was in the California Youth Authority.

Krista Armstrong testified that when she arrived at Michelle Diaz's apartment in the early morning of August 23, 2000, the victim was crying and screaming. She said defendant had forced her to have oral sex and intercourse at gunpoint and had hit her. The tape of Armstrong's 911 call was played; the victim's crying voice could be heard in the background.

Surrebuttal

Defendant produced a letter, which he said was written by R., sent to him at the California Youth Authority in 1997. It said: "[Y]ou were my first love but you did me wrong. Sorry it ended the way it did. You will always be . . . in my heart for life."

DISCUSSION

I

Defendant contends there was insufficient evidence to support his convictions on counts 2 through 6 (forced oral copulation) and 7 through 14 (rape) because the victim described the number of separate offenses inconsistently and at times said she was not counting them as they happened. We disagree.

When reviewing a claim of insufficient evidence, we construe the evidence in the light most favorable to the judgment. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-578.) In a case alleging multiple counts of sexual assault where the victim testifies credibly to at least as many separate offenses as are charged, the evidence is sufficient to support convictions on those charges even if the victim is inconsistent as to the exact number of acts committed. (See *People v. Jones* (1990) 51 Cal.3d 294, 316 (*Jones*); *People v. Newlun* (1991) 227 Cal.App.3d 1590, 1602 (*Newlun*).)

As to counts 2 through 6, the victim testified on direct examination that defendant forced her to take his penis into her mouth "[a]bout six times. Six, seven times." On cross-examination, she responded to counsel's assertion "[I]n fact, you were so scared you really don't know how many times you sucked his penis between the time you did it and the time he removed it from your mouth or you removed it and the time he put it back in your mouth" by saying "I really don't know how many times." However, when counsel followed up--"Could it have been as few as three times?"--she replied: "No. It was at least eight times or more. At least six times." When counsel asked whether it was at least eight times or at least six times, she replied "It was about six to around there. I wasn't really counting at the time, you know." She then added "It was around [six to seven times]. I'm not too positive. I wasn't taking count on that." But she adamantly rejected counsel's suggestion

that it "could have been as few as three or four": "No. It was more than four or five times, I know that. It was about six, seven, eight. I don't know, but it was more than that." Confronted with her statement to a detective that it had been five times, she did not disagree with that number, but simply repeated that she hadn't been "taking count at that time."

In short, the victim always said, both in and out of court, that defendant committed at least five such offenses. Every time defense counsel tried to get her to agree to a lower number, she refused. Thus, if believed, her in-court and out-of-court statements as to the number of acts sufficiently supported defendant's conviction of five counts of forced oral copulation. The facts that she gave different numbers above five and that she plausibly explained she did not keep count of the exact number did not render her testimony that defendant committed at least five offenses incredible. (See *Jones, supra*, 51 Cal.3d 294, 316; *Newlun, supra,* 227 Cal.App.3d 1590, 1602.)

As to counts 7 through 14 (rape), the story is the same: although the victim said there could have been more than eight acts and acknowledged she was not counting as it happened, she never admitted the true number could have been less than eight. Thus her testimony, if believed, supported defendant's conviction on eight counts of rape. (See *Jones, supra*, 51 Cal.3d 294, 316; *Newlun, supra*, 227 Cal.App.3d 1590, 1602.)

Defendant points out that the sexual assault examiner testified the victim did not mention a particular number of acts

of rape or forced oral copulation. But the examiner also testified she did not ask the victim how many such acts occurred. Thus, her testimony did not undermine the victim's credibility as to the number of offenses: it had no bearing on that issue.

Sufficient evidence supported defendant's conviction on all counts of forcible oral copulation and rape.

II

Defendant contends that Evidence Code section 1108 (§ 1108), under which R.'s testimony was admitted, violates federal constitutional guarantees of due process and equal protection. As he acknowledges, the California Supreme Court has upheld the constitutionality of section 1108 against a due process challenge. (*People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*).) This court has held that section 1108 does not violate constitutional guarantees of equal protection of the laws. (*People v. Fitch* (1997) 55 Cal.App.4th 172, 184-185.) Defendant's contentions of error are therefore without merit.

III

Defendant also contends that even if R.'s testimony was admissible under section 1108, it should have been excluded under Evidence Code section 352 (§ 352). We disagree.

On the prosecutor's motion in limine to introduce R.'s testimony under section 1108, the trial court ruled the evidence inadmissible in the prosecutor's case-in-chief, but admissible on rebuttal if defendant testified and claimed the charged

conduct was consensual. After defendant so testified, the trial court admitted the evidence, explaining: "[W]hen the defendant says . . . in front of the jury, that I would never do anything like that[,] . . . from the Court's standpoint, there wasn't much more weighing to do."

Even when evidence that a defendant charged with a sexual offense has committed another sexual offense is admissible under section 1108, the trial court may properly exclude it under section 352. (§ 1108; *Falsetta, supra*, 21 Cal.4th 903, 916-919.) Although section 1108 overrides the general ban on propensity evidence set out in Evidence Code section 1101 (§ 1101), a section 352 analysis of section 1108 evidence draws on the factors relevant to evidence offered under section 1101. (*People v. Harris* (1998) 60 Cal.App.4th 727, 737 (*Harris*).) These include the inflammatory nature of the evidence, the probability of jury confusion, the remoteness of the prior incident, the consumption of time required to present it at trial, and its probative value. (*Id.* at pp. 738-741.)

The trial court did not expressly rely on section 352 either when it barred the evidence from the prosecutor's case-in-chief or when it admitted the evidence on rebuttal. However, the parties had fully briefed the section 352 issues in limine, and we presume the court had their arguments in mind when it allowed the evidence to come in. Therefore we take the court's final ruling as an implied section 352 determination that the evidence's probative value outweighed its potential for

prejudice.[2] We review that finding for a manifest abuse of discretion. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124; *People v. Fitch, supra,* 55 Cal.App.4th 172, 183.) Defendant shows none.

Defendant's alleged conduct in the two incidents was similar: each time he pulled a gun on the victim and pointed it at her temple, struck her with his hand, and forced her to strip in the course of his assault. Moreover, both victims were young, slightly built Hispanic women whom defendant had known before he assaulted them. Because the incidents were so strongly similar, the prior incident was not more inflammatory than the charged crime. (See *People v. Soto* (1998) 64 Cal.App.4th 966, 991; *Harris, supra*, 60 Cal.App.4th 727, 737-738.) The prior incident was five years earlier, not an unduly remote period. It took little time to present at trial (less than 10 pages of trial transcript for R.'s testimony, plus three pages for defendant's surrebuttal testimony about her letter to him.) In light of these facts, the possibility that the

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[2] In making its first ruling, the court referred to R.'s proposed testimony as "this potentially, incredibly probative--incredibly, potentially damaging evidence." By ruling the evidence inadmissible in the prosecution's case-in-chief, the court might thus be said to have impliedly found it unduly prejudicial under section 352, presuming defendant did not testify. However, the court's remark about "weighing" when it finally admitted the evidence indicates it had changed its mind as to the proper section 352 balance because defendant's claim of consent had now made R.'s evidence more strongly probative as to defendant's intent in the present case.

evidence of the prior incident would confuse the jury was low. And, as the trial court impliedly found, the prior incident's probative value--high to begin with, given the similarity of the incidents--greatly increased after defendant put his intent in issue by testifying that the victim in the present case consented to sex and that he would never sexually assault a woman. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 402; § 1101.)

Defendant asserts the prior incident was more inflammatory than the charged assault because in the prior incident he spun the cylinder of the revolver, placed the gun barrel against R.'s head, and "attempted to fire the weapon," whereas in the present case he "threatened to shoot [the victim] but never acted on the threat." However, the jury could reasonably have inferred that defendant did not intend to fire the gun in the prior incident, but merely to intimidate R. Furthermore, in the present case, although he did not shoot the victim, he repeatedly pressed the gun against the back of her head, ultimately causing a tenderness detectible by the sexual assault examiner. Finally, because the prior incident stemmed from a lover's quarrel but the charged assault was purely predatory, the jury might have seen the prior incident as less heinous if anything.

Defendant asserts the prior incident was likely to confuse the jury because it required a "mini-trial" to determine whether the alleged events happened. But that does not distinguish this case from any other where section 1108 evidence is offered.

Defendant finally asserts that R.'s credibility was in doubt because she never reported the alleged assault and falsely denied having written to defendant afterward. If R.'s credibility was suspect, however, that could only have helped defendant. In any event, her credibility went to the weight of the evidence, not to its admissibility under section 352.

The trial court did not abuse its discretion by admitting R.'s testimony.

IV

Defendant contends the trial court wrongly excluded evidence that the sperm found in the victim's vagina after the alleged assault might have been deposited by a man with whom she had engaged in consensual sex on the morning of August 22, 2000. According to defendant, this evidence was highly relevant to his own and the victim's credibility, because he and the victim gave conflicting statements about whether he ejaculated during the alleged rape. Because the prosecution's entire case rested on the victim's credibility, in defendant's view, the error cannot be harmless. We find the trial court did not err by excluding the evidence, but even assuming error defendant suffered no prejudice.

Background

Defendant moved in limine under Evidence Code section 782 to introduce evidence, based on the victim's statement to the police, that she had voluntarily had intercourse with another man earlier on the date of the alleged assault; he asserted it

was relevant to the victim’s credibility because she claimed defendant assaulted her but he claimed their encounter was consensual.[3] The prosecutor opposed the motion, arguing irrelevance and undue prejudice.

The trial court denied the motion. The court found that defendant had not shown sufficient relevance even to justify a hearing on his proffered evidence, because he had not offered to show how consensual sex 10 hours before the alleged assault could have caused the victim’s injuries.

The victim initially testified that defendant ejaculated before he finished dressing after the assault. On cross-examination, she acknowledged she had specifically told an officer defendant ejaculated inside her. (Defendant later called the officer, who confirmed this.)

So far as we can tell, the jury never learned that defendant denied this allegation. In his testimony, defendant did not mention the topic. By stipulation of both counsel, parts of his videotaped police interview were played for the jury, but the record does not show what topics were discussed in those parts of the interview; nor does it show that defendant’s

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[3] Evidence Code section 782 provides that a defendant in a sexual assault case may offer proof that the sexual conduct of a complaining witness is relevant to the witness’s credibility under Evidence Code section 780, requires the trial court to hold a hearing on the evidence if the court finds the offer of proof sufficient, and ultimately permits the evidence to be presented at trial if it meets the tests of Evidence Code sections 780 and 352.

counsel tried unsuccessfully to get any other part of the interview into evidence.

To support his argument on appeal, defendant cites only the following statement by his trial counsel outside the jury's presence after the selected parts of the videotape had run: "I informed your Honor that my client has alleged in the videotape that he did not ejaculate into her." (This wording makes clear that the part of the interview in which defendant allegedly said that was not played in open court.) Trial counsel made this statement in support of an oral motion to admit evidence that the sexual assault examiner detected non-motile sperm in the victim's vagina. The trial court denied the motion for lack of relevance, noting that the prosecution was not planning to put on evidence either that sperm was or was not present in the victim's vagina at the time of the examination.

Analysis

Defendant's argument hinges on the premise that evidence of the victim's voluntary sexual activity would have helped the jury resolve a conflict in the evidence as to whether defendant ejaculated inside the victim or not, and thus would have bolstered his credibility and diminished the victim's. As we have explained, however, defendant has not shown that the jury heard conflicting evidence on this point. He also has not shown that his trial counsel tried to introduce into evidence the portion of the videotaped interview in which defendant supposedly denied ejaculating into the victim, or that the trial

court made any ruling barring that evidence. Accordingly, defendant’s argument fails for lack of evidentiary support. (Cal. Rules of Court, rule 14(a)(1)(C); *Millan v. Restaurant Enterprises Group, Inc.* (1993) 14 Cal.App.4th 477, 485.)

But even if the evidentiary conflict defendant alleges had actually been before the jury, defendant’s proffered evidence would properly have been excluded as irrelevant to any material issue or as unduly prejudicial. (Cf. Evid. Code, §§ 210 [evidence relevant only if it bears on a disputed fact of consequence to determination of action], 352.) No offense charged against defendant included ejaculation inside the victim as an element. Defendant did not offer to prove that non-motile sperm in the victim’s vagina could not have come from him. The prosecution had not offered and did not intend to offer any evidence on the subject. Finally, defendant’s evidence--even assuming it would have proved he did not ejaculate inside the victim--would have had great potential to confuse jurors by suggesting falsely that if the victim was honestly mistaken on this one inessential point, all her other testimony would fall under a cloud.

Besides, this case did not turn solely on the victim’s credibility. The physical evidence of her injuries corroborated her story, and defendant did not offer any other explanation for that evidence. Her friends testified to her distress immediately after the assault, and the sound of her crying voice on the 911 tape corroborated that testimony. The uncharged-acts

testimony of R. was the most powerful corroboration of all. On the other hand, defendant's attempts to explain away his admissions to the police--and to the victim in his letter of apology--were patently incredible.

For all the above reasons, defendant has failed to show that the trial court prejudicially abused its discretion by denying his motions. (Cf. *People v. Smithey* (1999) 20 Cal.4th 936, 970; *People v. Crittenden* (1994) 9 Cal.4th 83, 132.)

V

Defendant contends the trial court erred prejudicially by instructing the jury on flight (CALJIC No. 2.52).[4] Any error was harmless.

Defendant argues the instruction should not have been given because he did not flee after the alleged crime: he first dropped off the victim at the apartment complex, then got something to eat, then returned to the scene in response to an accusatory phone call from the victim's cousin. The People reply that his leaving the scene after dropping off the victim is enough to justify the instruction. We need not resolve this dispute.

CALJIC No. 2.52 as given did not tell the jury to find that defendant fled. Rather, it said: "The flight of a person

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[4] The People assert this contention is waived because defendant did not object to the instruction. The People are mistaken. (§ 1259; *People v. Elsey* (2000) 81 Cal.App.4th 948, 953-954, fn. 2.)

immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, *if proved*, may be considered by you in the light of all other proved facts deciding whether a defendant is guilty or not guilty. The weight to which the circumstance is entitled is a matter for you to decide." (Italics added.) The jury also received CALJIC No. 17.31, which told it to disregard any instruction that did not apply to the facts. Thus, if the jury did not find that the facts supported an inference of flight, we presume it disregarded the flight instruction.

Furthermore, assuming the jury found flight, CALJIC No. 2.52 benefited defendant because it told the jury not to conclude that flight proved guilt. Thus, even if the instruction should not have been given, defendant cannot show it prejudiced him. (See *People v. Mendoza* (2000) 24 Cal.4th 130, 180.)

VI

Defendant contends the trial court erred prejudicially by instructing the jury over objection with CALJIC No. 17.41.1. However, our Supreme Court has recently upheld the legality of this instruction (*People v. Engelman* (2002) 28 Cal.4th 436.) Defendant's contention of error is therefore without merit.

VII

Defendant contends the cumulative prejudice from the trial court's errors compels reversal. As we have found either no error or harmless error, we reject this contention.

VIII

Defendant contends the trial court erroneously sentenced him to consecutive terms on count 3 (forcible oral copulation; § 288a, subd. (c)(2)), count 7 (forcible rape; § 261, subd. (a)(2)), and count 15 (forcible digital penetration; § 289, subd. (a)(1)) in the mistaken belief that section 667.6, subdivision (d), required such sentencing. We shall conclude the trial court lawfully sentenced defendant.

The trial court followed the probation report's recommendation of consecutive sentencing on counts 3, 7, and 15 under section 667.6, subdivision (d), finding: "[T]here really were three separate occasions of sex acts: The series of forcible oral copulation[s], then the sequence of fondling and digital penetration and then a series of forcible rapes."

The People assert defendant waived his challenge to the sentencing by failing to object below. (See *People v. Scott* (1994) 9 Cal.4th 331, 356-357 (*Scott*).) The People are incorrect. *Scott* expressly exempts unauthorized sentences from its waiver rule. (*Id.* at p. 354 & fn. 17.) Defendant claims the trial court could not lawfully sentence him to consecutive terms on counts 3, 7, and 15 under section 667.6, subdivision (d), because his offenses on those counts did not occur on

separate occasions as that provision requires. If he is correct, the sentence was unauthorized in this respect. He has not waived the issue.

Section 667.6, subdivision (d), provides in part: "A full, separate, and consecutive term shall be served for each violation of . . . paragraph (2) . . . of subdivision (a) of Section 261, . . . subdivision (a) of Section 289, . . . or of committing . . . oral copulation in violation of Section . . . 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim . . . if the crimes involve . . . the same victim *on separate occasions*.

"*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 . . . actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his . . . opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions.*" (See *People v. Jones* (2001) 25 Cal.4th 98, 105, italics added.)

Our Supreme Court has recently summarized case law construing the "separate occasions" requirement of section 667.6, subdivision (d) as follows:

"Under the broad standard established by . . . section 667.6, subdivision (d), the Courts of Appeal have not required a break of any specific duration or any change in physical location. Thus, the Court of Appeal herein cited *People v. Irvin* (199[5]) 43 Cal.App.4th 1063, 1071, for the principle that a finding of 'separate occasions' under . . . section 667.6 does not require a change in location or an obvious break in the perpetrator's behavior: '[A] forcible violent sexual assault made up of varied types of sex acts committed over time against a victim, is not necessarily one sexual encounter.' Similarly, the Court of Appeal in *People v. Plaza* (1995) 41 Cal.App.4th 377, 385, affirmed the trial court's finding that sexual assaults occurred on 'separate occasions' although all of the acts took place in the victim's apartment, with no break in the defendant's control over the victim. (But see *People v. Pena* (1992) 7 Cal.App.4th 1294, 1316, [defendant's change of positions between different sexual acts was insufficient by itself to provide him with a reasonable opportunity to reflect upon his actions, 'especially where the change is accomplished within a matter of seconds']; *People v. Corona* (1988) 206 Cal.App.3d 13, 18, [holding, after the respondent implicitly conceded the point, that the trial court erred in imposing consecutive sentences for different sexual acts when there was no cessation of sexually assaultive behavior 'between' acts].)" (*People v. Jones, supra,* 25 Cal.4th 98, 104-105.)

Once a trial judge has found under section 667.6, subdivision (d), that a defendant commmitted offenses on separate occasions, we may 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. Plaza* (1995) 41 Cal.App.4th 377, 384 (*Plaza*); *People v. Pena* (1992) 7 Cal.App.4th 1294, 1314 (*Pena*).) Applying this deferential standard, we conclude the trial court here could reasonably have decided that counts 3, 7, and 15 (forcible oral copulation, rape, and forcible digital penetration) occurred on separate occasions. After defendant forced the victim to orally copulate him, he let go of her neck, ordered her to strip, punched her in the eye, put his gun to her head and threatened to shoot her, and stripped along with her. That sequence of events afforded him ample opportunity to reflect on his actions and stop his sexual assault, but he nevertheless resumed it. Thus, defendant's first act of rape was committed on a separate occasion from the forcible oral copulations. (*Plaza, supra*, 41 Cal.App.4th 377, 384-385.)

Similarly, defendant had an adequate opportunity to reflect upon his actions between the time he inserted his finger in the victim's vagina and the commission of the first rape. During this interval, defendant (1) began to play with the victim's chest; (2) put his gun on the back seat; (3) pulled the victim's legs around his shoulders and, finally, (4) forced his penis

inside her vagina. A reasonable trier of fact could have found the defendant had adequate opportunity for reflection between these sex acts and that the acts therefore occurred on separate occasions for purposes of application of section 667.6, subdivision (d). (*Plaza, supra,* 41 Cal.App.4th 377, 384-385.)

The trial court did not err in sentencing defendant.

IX

As noted, the trial court imposed 10-year enhancements on counts 3, 7, and 15 under section 12022.53, subdivision (b). That provision states in part: "Notwithstanding any other provision of law, any person who is convicted of a felony specified in subdivision (a), and who in the commission of that felony personally used a firearm, shall be punished by a term of imprisonment of 10 years in the state prison, which shall be imposed in addition and consecutive to the punishment prescribed for that felony."

However, in *People v. Moody* (2002) 96 Cal.App.4th 987 (*Moody*), a case decided after trial and sentencing here, we held that where a defendant was convicted of attempted second degree robbery and was sentenced to a consecutive term for that offense, with an enhancement under section 12022.53, subdivision (b), the trial court could not impose a full 10-year term for the enhancement. We explained that in a case involving principal and subordinate terms for the crime of attempted robbery section 1170.11 commanded that the preexisting enhancement sentencing limitation of section 1170.1 still

applied. Section 1170.1 provides in pertinent part: "The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, *and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses*." (*Moody, supra*, 96 Cal.App.4th at pp. 990-993, italics added.) Thus, the trial court could lawfully impose only one-third of the enhancement term, or three years and four months, for any enhancement pursuant to section 12022.53, subdivision (b), on a consecutive, subordinate term imposed for attempted robbery.

We requested and received supplemental briefing from the parties on the question whether, in light of *Moody*, full consecutive terms could be imposed for the firearm use enhancements on consecutive terms for counts 3, 7, and 15 in this case. For reasons that follow, we conclude that the crimes at issue, unlike the attempted robbery in *Moody*, are subject to the provisions of subdivision (h) of section 1170.1, which provides for full-term enhancements.

At the outset, we acknowledge the Attorney General is correct in his argument that, for purposes of application of section 1170.1, count 3 should be treated as a principal term, not a subordinate term subject to reduction. At oral argument, defendant conceded the Attorney General is correct on this point. The sentence on count 3 was run consecutive to the 25

years-to-life sentence imposed on count 2. However, the 25 years-to-life sentence is an indeterminate sentence. (*People v. Felix* (2000) 22 Cal.4th 651, 659.) Section 1170.1, which requires reduction of consecutive terms to one-third, "fully applies only when all terms of imprisonment are 'determinate,' i.e. of specified duration. A life sentence is 'indeterminate,' i.e. not for a fixed period. When a defendant is sentenced to both a determinate and an indeterminate sentence, the determinate sentence is served first. Nonetheless, neither term is 'principal' [n]or 'subordinate.' *They are to be considered and calculated independently of one another.* [Citation.]" (*People v. Reyes* (1989) 212 Cal.App.3d 852, 856, italics added; cited with approval in *People v. Felix, supra,* 22 Cal.4th 651, 658.) Because the determinate term on count 3 was to be calculated independently of the indeterminate term imposed on count 2, the trial court correctly imposed the full 10-year enhancement on count 3.

With respect to counts 7 and 15, we have concluded sentence on those counts was properly imposed pursuant to section ll70.1, subdivision (h).

In *People v. Fitch* (1985) 171 Cal.App.3d 211, this court considered whether separate, two-year enhancements for use of a firearm, were properly imposed on four consecutive counts of forcible oral copulation (§ 288a, subd. (c)). We concluded that the four separate enhancements were authorized by former section 1170.1, subdivision (i), which then provided: "For any

violation of subdivision (2) or (3) of Section 261, Section 264.1, subdivision (b) of Section 288, Section 289, or sodomy or oral copulation by force, violence, duress, menace or threat of great bodily harm as provided in Section 286 or 288a, the number of enhancements which may be imposed shall not be limited, regardless of whether such enhancements are pursuant to this or some other section of law. Each of such enhancements shall be a full and separately served enhancement and shall not be merged with any term or with any other enhancement." (*People v. Fitch, supra,* 171 Cal.App.3d at pp. 212, 214, fn. 2.)

In reaching this conclusion in *Fitch*, we said, "Subdivision (d) of section 667.6 is obviously not an alternative sentencing scheme to that in section 1170.1. Rather, it is mandatorily applicable to cases within its terms, supplanting to that extent the generally applicable consecutive sentencing scheme of section 1170.1. However, . . . the Legislature did not make subdivision (d) mutually exclusive with the totality of section 1170.1. Thus to the extent they are not inconsistent with subdivision (d), the provisions of section 1170.1 apply to cases within subdivision (d)." (*People v. Fitch, supra,* 171 Cal.App.3d 211, 214.) We continue to subscribe to this analysis.

The substance of former section 1170.1, subdivision (i), which we construed in *Fitch*, is now found in section 1170.1, subdivision (h), which provides as follows: "(h) For any violation of an offense specified in Section 667.6, the number

of enhancements that may be imposed shall not be limited, regardless of whether the enhancements are pursuant to this section, Section 667.6, or some other provision of law. *Each of the enhancements shall be a full* and separately served *term*." (Italics added.)

In the instant case, counts 7 and 15 are convictions for violation of, respectively, sections 261(a)(2) and 289, subdivision (a)(1). Both of these offenses are "specified in section 667.6" as section 1170.1, subdivision (h) requires.[5]

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[5] Section 667.6 provides: "(a) Any person who is found guilty of violating paragraph (2), (3), (6), or (7) of subdivision (a) of Section 261, paragraph (1), (4), or (5) of subdivision (a) of Section 262, Section 264.1, subdivision (b) of Section 288, Section 288.5 or subdivision (a) of Section 289, of committing sodomy in violation of subdivision (k) of Section 286, of committing oral copulation in violation of subdivision (k) of Section 288a, or of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person who has been convicted previously of any of those offenses shall receive a five-year enhancement for each of those prior convictions provided that no enhancement shall be imposed under this subdivision for any conviction occurring prior to a period of 10 years in which the person remained free of both prison custody and the commission of an offense which results in a felony conviction. In addition to the five-year enhancement imposed under this subdivision, the court also may impose a fine not to exceed twenty thousand dollars ($20,000) for anyone sentenced under these provisions. The fine imposed and collected pursuant to this subdivision shall be deposited in the Victim-Witness Assistance Fund to be available for appropriation to fund child sexual exploitation and child sexual abuse victim counseling centers and prevention programs established pursuant to Section 13837.

"(b) Any person convicted of an offense specified in subdivision (a) who has served two or more prior prison terms as

defined in Section 667.5 for any offense specified in subdivision (a), shall receive a 10-year enhancement for each of those prior terms provided that no additional enhancement shall be imposed under this subdivision for any prison term served prior to a period of 10 years in which the person remained free of both prison custody and the commission of an offense which results in a felony conviction. In addition to the 10-year enhancement imposed under this subdivision, the court also may impose a fine not to exceed twenty thousand dollars ($20,000) for any person sentenced under this subdivision. The fine imposed and collected pursuant to this subdivision shall be deposited in the Victim-Witness Assistance Fund to be available for appropriation to fund child sexual exploitation and child sexual abuse victim counseling centers and prevention programs established pursuant to Section 13837.

"(c) In lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation of Section 220, other than an assault with intent to commit mayhem, provided that the person has been convicted previously of violating Section 220 for an offense other than an assault with intent to commit mayhem, paragraph (2), (6), (3), or (7) of subdivision (a) of Section 261, paragraph (1), (4), or (5) of subdivision (a) of Section 262, Section 264.1, subdivision (b) of Section 288, Section 288.5 or subdivision (a) of Section 289, of committing sodomy in violation of subdivision (k) of Section 286, of committing oral copulation in violation of subdivision (k) of Section 288a, or of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person whether or not the crimes were committed during a single transaction. If the term is imposed consecutively pursuant to this subdivision, it shall be served consecutively to any other term of imprisonment, and shall commence from the time the person otherwise would have been released from imprisonment. The term shall not be included in any determination pursuant to Section 1170.1. Any other term imposed subsequent to that term shall not be merged therein but shall commence at the time the person otherwise would have been released from prison.

"(d) A full, separate, and consecutive term shall be served for each violation of Section 220, other than an assault with intent to commit mayhem, provided that the person has been convicted previously of violating Section 220 for an offense other than an assault with intent to commit mayhem, paragraph

That subdivision unambiguously mandates that each of the firearm enhancements be a full term. Although we did not consider in *Fitch* whether each of the separate firearm use enhancements had to be a full term, in fact each two-year enhancement term was a full term under the version of section 12022.5 in effect when

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(2), (3), (6), or (7) of subdivision (a) of Section 261, paragraph (1), (4), or (5) of subdivision (a) of Section 262, Section 264.1, subdivision (b) of Section 288, subdivision (a) of Section 289, of committing sodomy in violation of subdivision (k) of Section 286, of committing oral copulation in violation of subdivision (k) of Section 288a, or of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person if the crimes involve separate victims or involve the same victim on separate occasions.

"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.

"The term shall be served consecutively to any other term of imprisonment and shall commence from the time the person otherwise would have been released from imprisonment. The term shall not be included in any determination pursuant to Section 1170.1. Any other term imposed subsequent to that term shall not be merged therein but shall commence at the time the person otherwise would have been released from prison.

"(e) If the court orders a fine to be imposed pursuant to subdivision (a) or (b), the actual administrative cost of collecting that fine, not to exceed 2 percent of the total amount paid, may be paid into the general fund of the county treasury for the use and benefit of the county."

defendant committed his crimes. (See Stats. 1977, ch. 165, § 92, p. 678.)

We conclude the trial court properly imposed separate full-term enhancements on counts 7 and 15.

The trial court did not err in sentencing defendant.

DISPOSITION

The judgment is affirmed.

SIMS, Acting P.J.

We concur:

DAVIS, J.

MORRISON, J.