Filed 6/13/12

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. ALEXANDER ROLANDO SOLIS, Defendant and Appellant.	C063851 (Super. Ct. No. CM029834)

APPEAL from a judgment of the Superior Court of Butte County, Thomas W. Kelly, Judge. Remanded and affirmed.

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

Kamala D. Harris and Edmund G. Brown, Jr., Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Catherine Chatman and Heather S. Gimle, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts I, III, IV, and V of the Discussion.

Defendant was convicted by a jury of three counts of forcible rape (Pen. Code, § 261, subd. (a)(2)) and one count of receiving stolen property (*id.*, § 496, subd. (a)) and was sentenced to full consecutive terms on the rape counts. (Further undesignated section references are to the Penal Code.)

He appeals, contending: (1) defense counsel's failure to object to evidence of prior uncharged acts of violence amounted to ineffective assistance; (2) the legal standard for imposing full consecutive sentences under section 667.6, subdivision (d), where multiple sex offenses occur on "separate occasions" is unconstitutionally vague; (3) he was denied the right to a jury trial on whether the three rapes occurred on separate occasions; and (4) there is insufficient evidence of one of the three rapes or, in the alternative, the trial court erred in failing to instruct on the definition of sexual intercourse necessary for rape.

We requested supplemental briefing on two additional issues: (5) whether the trial court provided an adequate statement of reasons for imposing full consecutive sentences on the three rape offenses; and (6) whether there is sufficient evidence to support a finding that the three rapes occurred on separate occasions.

We reject each of defendant's contentions. However, we conclude the evidence does not support the trial court's implied finding that the third rape occurred on a separate occasion. We therefore remand for resentencing.

FACTS AND PROCEEDINGS

During much of 2008, defendant and the victim, Jenna B., were in a dating relationship. In May of that year, defendant assisted the victim in moving out of her dormitory room at California State University, Chico. Another student, K.S., was moving out of her dorm room around the same time. At one point, K.S. left the door to her room open slightly while she took things to her car. Inside the room, she left a large black purse containing, among other things, a laptop computer. When K.S. returned to her room, the purse and its contents were gone. Sometime later, defendant gave the purse to the victim as a gift and sold the computer to his roommate for $500. At the time of the sale, defendant knew the computer had been stolen.

On October 18, 2008, defendant and the victim were together at her residence and got into an argument about defendant eating the rest of a banana bread she had made and calling the victim "a fat Arab bitch," "slut," and "whore." The victim asked defendant to leave and dropped him off at his residence. Around midnight, the victim sent defendant a text message inviting him to come over and sleep with her. Defendant responded with a message that it was "up to [her]." The victim replied, "never mind."

Nevertheless, around 2:00 a.m. on October 19, defendant showed up at the victim's residence and knocked on her bedroom window. The victim woke up and let him in. Defendant was

belligerent and angry. The victim asked him to leave, but he refused.

Around this time, defendant got a telephone call from his ex-girlfriend who asked where defendant had been. Defendant responded that he had "been dating a fucking slut." The victim again asked defendant to leave but he refused. He grabbed the victim's cell phone and tried to break it and then laid down on the floor to sleep.

The victim grabbed defendant's leg and began dragging him out of her room. Defendant started kicking the victim and she kicked him back. Defendant stood up and overturned a nightstand and chair. He threatened to knock the victim out.

A week or so earlier, the victim had told defendant she might be pregnant and he appeared to be pleased at the prospect. However, the victim later learned she was not pregnant. While arguing with defendant in her room during the early morning hours of October 19, the victim told defendant that if she had been pregnant, she would have aborted the fetus. She was purposely trying to hurt him in order to induce him to leave, but he would not.

The victim eventually screamed for her roommate, J.D., who opened her bedroom door and found defendant and the victim standing nearby. The victim was crying and complained that defendant had her cell phone. J.D. told defendant to give the victim back her phone and he complied. J.D. returned to her room and closed the door.

The victim and defendant returned to her room, where the victim attempted to call 911. Defendant grabbed her phone and took the battery out of it. The victim later went to sleep in her room and defendant slept on a couch in the common area of the residence.

The next morning, defendant knocked on the victim's door and she let him in. She returned to her bed. Defendant was still upset and she asked him to leave. He refused. The victim asked for her phone battery and defendant told her she could have it after she gave him a ride home. She refused.

Defendant approached the victim's bed and pulled her toward the middle of it. He grabbed her foot and pushed it behind her head. He got on the bed and placed his body on top of her. The victim was wearing only panties and a t-shirt. Defendant began ripping the victim's panties and eventually pulled them down over her legs, while the victim struggled to stop him. Defendant "shoved" his finger inside the victim's vagina and said he would make it so she could not have babies. Defendant was smiling and appeared to be enjoying himself. He then removed his finger and inserted it in her anus. The victim told defendant to stop and he responded, "Shut the fuck up."

Defendant removed his finger, stood up and said, "I can put my dick in you right now." Defendant removed his clothes, got on top of the victim, held her legs back with his hands, and inserted his penis in her vagina. She begged him to stop and he again said, "Shut the fuck up." Defendant said, "How does it feel to be the first girl I raped?"

Defendant pulled his penis out of the victim's vagina and told her to turn over. She refused. He told her she had a choice between her "ass" and her mouth. She then complied. Defendant inserted his penis inside the victim again, while holding her neck with one hand and her hair with the other. Defendant then removed his penis and began rubbing it over her "butt." He again inserted his penis in her vagina. Finally, defendant removed his penis, moved up the victim's back and ejaculated on the side of her face.

Defendant got up and got dressed and the victim drove him home. When she returned to her residence, the victim met J.D., who was leaving for the gym. The victim was crying and told J.D. defendant had raped her. J.D. called the police.

The police responded to the scene and the victim was taken to a hospital for examination. The victim had a lot of bruising on her body, mostly on her legs. She also had semen in her hair. The examination of the victim's vagina was consistent with her report of the incident.

While the police were at the scene, defendant arrived to retrieve his wallet that he had left behind. He was detained and later taken to the police station. While there, the victim placed a pretext call to defendant and repeatedly asked him why he had done "it." Defendant professed not to know what she was talking about but eventually said, "[b]ecause I'm stupid, I'm an idiot." At one point, the victim said, "I've never seen this side of you," and defendant responded that he had "never seen

this side of [himself] either." Defendant further said, "I know I was wrong. I know you know that I'm not like that."

Defendant was charged with three counts of forcible rape (§ 261, subd. (a)(2)), two counts of sexual penetration with a foreign object (§ 289, subd. (a)(1)), and one count of receiving stolen property (§ 496, subd. (a)). He was convicted by a jury of the rape and stolen property counts, but acquitted of the sexual penetration charges. Defendant was sentenced to the middle term of two years for the property offense and full consecutive middle terms of six years on each of the rapes, for an aggregate sentence of 20 years.

DISCUSSION

I

Uncharged Acts Evidence

The victim testified that, on several occasions prior to the October 19 incident, defendant physically abused her. According to the victim, on her birthday in June 2008, she and defendant were at her parent's home in Pleasanton and she awoke to find defendant hitting her in the stomach. Defendant had the victim's cell phone which showed that she had received a call from an ex-boyfriend wishing her a happy birthday. Defendant also spit in the victim's face.

On another occasion approximately a month later, while defendant, the victim, and her mother were visiting a friend in Long Beach, defendant asked to speak with the victim alone in her room. After defendant closed the door to the room, he

"grabbed [her] by [the] throat and pushed [her] back into the wall." Later, defendant told the victim "he only hit on [her] and his ex-girlfriend, Sheila[,] and that it's because [they] were the ones he cared about the most."

The last incident occurred in September 2008, after the victim returned to school for the year. Defendant and the victim had gone out in the evening, got into an argument, and returned to defendant's residence. The victim decided to return to her own residence and walked outside. Defendant came up behind her, grabbed her hair and pulled her backward. He then picked the victim up and carried her back into his room, while the victim struggled to get away. The victim tried to climb out a window, but he pulled her back. Defendant then "bear-hugged [the victim] all night until [she] fell asleep."

Defense counsel did not object to any of the foregoing evidence. Defendant contends on appeal the evidence was inadmissible and his attorney's failure to object amounted to ineffective assistance.

A criminal defendant's right to the assistance of counsel is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution. (See *Strickland v. Washington* (1984) 466 U.S. 668, 684-685 [80 L.Ed.2d 674, 691-692]; *People v. Pope* (1979) 23 Cal.3d 412, 422.) This right "entitles the defendant not to some bare assistance but rather to *effective* assistance." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) "In order to demonstrate ineffective assistance of counsel, a defendant must

first show counsel's performance was 'deficient' because his 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.] Second, he must also show prejudice flowing from counsel's performance or lack thereof." (*People v. Jennings* (1991) 53 Cal.3d 334, 357.)

Evidence Code section 1101 prohibits the admission of character evidence, including evidence of prior, uncharged offenses, "when offered to prove his or her conduct on a specified occasion." (Evid. Code, § 1101, subd. (a).) The purpose of this prohibition "is to avoid placing the accused in a position of having to defend against crimes for which he has not been charged and to guard against the probability that evidence of other criminal acts having little bearing on the question whether defendant actually committed the crime charged would assume undue proportions and unnecessarily prejudice defendant in the minds of the jury, as well as [to] promote judicial efficiency by restricting proof of extraneous crimes." (*People v. Kelly* (1967) 66 Cal.2d 232, 238-239.)

Notwithstanding the foregoing prohibition, evidence of uncharged offenses may be admitted when relevant to prove some fact in issue, such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or consent. (Evid. Code, § 1101, subd. (b).) The admissibility of evidence of uncharged offenses under this exception depends upon the fact sought to be proved and the degree of similarity

between charged and uncharged offenses. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403.)

The People do not contend evidence of defendant's prior violent acts against the victim was admissible to prove any fact in issue in this case and, therefore, we are not called upon to consider that question. Rather, the People contend defense counsel purposely failed to object to the prior violence evidence as a matter of trial tactics. This case was primarily a credibility contest between the victim and defendant, who testified on his own behalf and asserted he and the victim had consensual sex on the morning of October 19. Defendant also testified about the alleged prior incidents, asserting that while he and the victim did argue in Pleasanton and Long Beach, he did not hit her either time. The People point out that defense counsel attempted to discredit the victim regarding the alleged prior incidents by pointing out discrepancies in her account. Thus, the People argue, defense counsel's strategy may well have been to show the victim was lying about these prior incidents and, therefore, must be lying about the October 19 incident as well. During closing argument to the jury, defense counsel reminded them of the instruction that if a witness deliberately lies in part of her testimony, the jury may consider not believing anything the witness said. Defense counsel further argued: "I think you've got to know she was lying about part of it and you've got to question this all happened the way it would . . . ."

"In evaluating a defendant's claim of deficient performance by counsel, there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' [citations], and we accord great deference to counsel's tactical decisions. [Citation.] Were it otherwise, appellate courts would be required to engage in the '"perilous process"' of second-guessing counsel's trial strategy. [Citation.] Accordingly, a reviewing court will reverse a conviction on the ground of inadequate counsel 'only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.' [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 979-980, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

"Generally, failure to object is a matter of trial tactics as to which we will not exercise judicial hindsight." (*People v. Kelly* (1992) 1 Cal.4th 495, 520.) "A reviewing court will not second-guess trial counsel's reasonable tactical decisions." (*Ibid.*) "[I]n the heat of a trial, defense counsel is best able to determine proper tactics in the light of the jury's apparent reaction to the proceedings. The choice of when to object is inherently a matter of trial tactics not ordinarily reviewable on appeal." (*People v. Frierson* (1991) 53 Cal.3d 730, 749.)

One may reasonably argue that all of defense counsel's actions after the prosecution introduced the prior bad acts evidence was merely an attempt to minimize the damage already done and that counsel did not have some grand strategy to turn

the tables on the prosecution. On the other hand, based on the record before us, we cannot say defense counsel did not pursue the strategy suggested by the People. In the prior incidents, the victim was not altogether clear as to what defendant had done to her and she did not report the alleged assaults to anyone immediately after they occurred. As for the October 19 incident, the victim described the assault in some detail and immediately reported it to her roommate. Defendant was also faced with his own damning statements during the pretext call. Because we cannot say on the present record that defense counsel did not have a reasonable tactical basis for letting the evidence come in, we reject defendant's ineffective assistance claim.

II

Vagueness of "Separate Occasions" Standard

Defendant received full consecutive terms on each of the rapes based on a finding by the trial court that the offenses occurred on "separate occasions," within the meaning of section 667.6, subdivision (d). Defendant contends the full consecutive terms cannot stand, because the legal standard for finding offenses were committed on "separate occasions" is unconstitutionally vague. He further contends that, in the event this contention has been forfeited by counsel's failure to object, he received ineffective assistance of counsel.

"[A] statute must be sufficiently definite to provide adequate notice of the conduct proscribed. '[A] statute which

either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" (*People v. Superior Court (Caswell)* (1988) 46 Cal.3d 381, 389.) Vague statutes are proscribed both because they fail to alert the public of the conduct required or prohibited and because they do not provide sufficient guidelines for enforcement. (*Id.* at pp. 389-390.)

Section 667.6, subdivision (d), reads: "A full, separate, and consecutive term shall be imposed for each violation of an offense specified in subdivision (e) [including forcible rape (§ 667.6, subd. (e)(1))] 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. . . ."

Defendant contends the vagueness of the foregoing language is evident from the fact the Court of Appeal has not been able to settle on a single standard for assessing whether multiple sex offenses were committed on separate occasions. He cites as

support *People v. Corona* (1988) 206 Cal.App.3d 13 (*Corona*), *People v. Pena* (1992) 7 Cal.App.4th 1294 (*Pena*), *People v. Plaza* (1995) 41 Cal.App.4th 377 (*Plaza*), *People v. Garza* (2003) 107 Cal.App.4th 1081 (*Garza*), and *People v. King* (2010) 183 Cal.App.4th 1281 (*King*). However, as we shall explain, there is no inconsistency in the foregoing appellate decisions.

In *Corona*, the defendant removed the victim's pants, put his finger in her vagina, kissed her genitals and then put his penis in her vagina. After five or six minutes, he departed. Five minutes later, the defendant returned and the victim asked why he was doing this to her. The defendant placed a knife against her thigh and said if she did not cooperate, "'this will hurt you more.'" (*Corona*, *supra*, 206 Cal.App.3d at p. 15.) He then resumed his sexual assault. (*Ibid.*) The defendant was convicted of eight offenses, including four sex offenses, and was sentenced on all four sex offenses under section 667.6, subdivision (d). (*Id.* at p. 16.)

On appeal, the defendant argued the trial court erred in imposing full consecutive terms on the four sex offenses. The People conceded the convictions for penetration with a foreign object and oral copulation that preceded the first rape did not occur on separate occasions and we accepted that concession. (*Corona*, *supra*, 206 Cal.App.3d at p. 16.) We explained: "There is no evidence of any interval 'between' these sex crimes affording a reasonable opportunity for reflection; there was no cessation of sexually assaultive behavior hence defendant did not 'resume[] sexually assaultive behavior.'" (*Id.* at p. 18.)

However, we also concluded consecutive sentencing on the two rapes was proper because, after the first rape, the defendant left and returned a short time later to resume his assault. (*Id.* at pp. 17-18.)

In *Pena*, the defendant forced the victim into her home and onto a bed where he raped her. He then "got off of her, twisted her by the legs violently, and orally copulated her." (*Pena*, *supra*, 7 Cal.App.4th at p. 1299.) The defendant was convicted of burglary, rape and forcible oral copulation. (*Id.* at p. 1300.) The trial court found the two sex crimes were committed on separate occasions and imposed full consecutive sentences. (*Id.* at p. 1313.)

The Court of Appeal found the evidence insufficient to support the separate occasions finding. Relying in part on *Corona* and our conclusion that the digital penetration, oral copulation and first rape in that case did not occur on separate occasions, the court concluded: "[A]ppellant did not have a 'reasonable opportunity to reflect' between his acts of rape and forcible oral copulation. As was the case in *People v. Corona*, nothing in the record before this court indicates *any* appreciable interval 'between' the rape and oral copulation. After the rape, appellant simply flipped the victim over and orally copulated her. The assault here was also continuous. Appellant simply did not cease his sexually assaultive behavior, and, therefore, could not have 'resumed' sexually assaultive behavior." (*Pena*, *supra*, 7 Cal.App.4th at p. 1316.)

In *Plaza*, the defendant put his penis in the victim's mouth while they were in the bathroom. He then took the victim into her bedroom and onto her bed. There, he ripped off her underwear and inserted his fingers into her vagina. After withdrawing his fingers, he listened to the victim's answering machine while still on top of her. He got angry, hit the wall several times, and then again forced her to orally copulate him. The defendant removed his penis from her mouth, slid down her body, slapped her face and called her names for several minutes. He then kicked the victim's legs open and inserted his penis in her vagina. After that, he removed his penis, turned the victim over, and again inserted his penis in her vagina. He then forced the victim to orally copulate him once again. The defendant was interrupted by several phone calls, after which he forced the victim to orally copulate him. The ordeal ended when one of the victim's friends arrived at her house. (*Plaza*, *supra*, 41 Cal.App.4th at pp. 380-381.)

The defendant was charged with eight separate sex offenses, and was convicted of five of them. (*Plaza*, *supra*, 41 Cal.App.4th at pp. 381-382.) He was sentenced to five full consecutive terms of six years pursuant to section 667.6, subdivision (d). (*Id.* at p. 382.) On appeal, the defendant argued he could not be sentenced under section 667.6, subdivision (d), because he never ceased his assaultive behavior. (*Id.* at p. 383.) The Court of Appeal disagreed and affirmed. Relying on both *Corona* and *Pena*, the court explained: "The trial court expressly found, as to each separate offense,

that Plaza 'had a reasonable opportunity to reflect upon his actions and nevertheless resumed his sexually assaultive behavior.' Clearly, the evidence supports that finding. The first act of forced oral copulation (count 1) was in the victim's bathroom. Although Plaza continued to restrain Elizabeth, his assaultive *sexual* behavior then stopped as he pushed her into the bedroom, forced her onto the bed, grabbed her by the throat, ripped off her underwear and inserted his fingers into her vagina (count 4). Plaza then again stopped his assaultive *sexual* behavior, listened to Elizabeth's answering machine, then punched three holes in the wall. Only then did he commit another act of oral copulation (count 2). [¶] At that point, although Plaza did not get up, he stopped what he was doing, removed his penis from Elizabeth's mouth, slid down, repeatedly slapped her face and called her names over and over again for a period of about five minutes and, only after he was through verbally abusing her, kicked her legs apart and raped her (count 3). Although Plaza was not convicted of the rape charged in count 6 or the oral copulation charged in count 5, those acts of intercourse and oral copulation plus three telephone calls preceded the final act of oral copulation of which Plaza was convicted (count 7)." (*Id.* at pp. 384-385.)

In *Garza*, the defendant was convicted of 18 offenses, including 15 sex offenses, and received full consecutive terms on three of them. (*Garza*, *supra*, 107 Cal.App.4th at p. 1084.) We affirmed the imposition of consecutive terms, explaining: "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. [Citation.] [¶] 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)." (*Id.* at pp. 1092-1093.)

Finally, in *King*, a police officer stopped a motorist and proceeded to grope her under the ruse of performing a patdown search. The officer was convicted of sexual battery, two counts of unlawful genital penetration, and two counts of unlawful sexual penetration. (*King*, *supra*, 183 Cal.App.4th at pp. 1286-1287.) In rejecting the defendant's challenge to consecutive sentencing, the court concluded: "Here, the trial court specifically determined that King, who sexually assaulted Nicole under the ruse that he was performing a lawful search, used the

fingers of one hand to penetrate Nicole's vagina. When he saw lights and a car drove by, he momentarily paused to look around uneasily, and then reinserted the fingers of his other hand in a separate assaultive act. The court observed the fact that King 'removed his finger when the lights went by. He looked uneasy; showing he knows what he's doing was wrong.' And, later, the court reiterated that, once King 'noticed the lights of Marilyn's car . . . he removed his fingers, looked around and looked uneasy. He could have stopped at that point. This was the opportunity giving [King] the opportunity to reflect about his actions. [¶] After the coast was clear, this intelligent experienced man then decided to re-insert a finger with his other hand for about another 25 seconds.' Accordingly, the court specifically found 'that this qualifies for a separate full consecutive term.'" (*Id.* at p. 1325.)

Defendant argues the foregoing cases reflect what is *not* required for a finding of separate occasions, i.e., no need for movement from one room to another and no need for a particular length of delay between separate acts, but do not explain what *is* required. According to defendant, "the courts have inexorably moved in the direction of finding that repeated sexual acts, without more, are sufficient to support an inference that the defendant had a reasonable opportunity to reflect and nevertheless continued the abuse." Defendant argues the courts have thereby emptied the "separate occasions" requirement of any meaning and left defendants to guess at its meaning.

We disagree. In *People v. Jones* (2001) 25 Cal.4th 98, the state high court noted the Court of Appeal has "not required a break of any specific duration or any change in physical location" in order to qualify for sentencing under section 667.6, subdivision (d). (*Id.* at p. 104.) Nor need there be any "obvious break" in the defendant's behavior. (*Ibid.*) Nevertheless, the question remains whether, between specific sex acts, "the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior." (§ 667.6, subd. (d).) All of the cases cited by defendant agree on this principle.

"In determining whether a statute is sufficiently certain to comport with due process standards, the court will 'look first to the language of the statute, then to its legislative history, and finally to California decisions construing the statutory language.'" (*People v. Estrada* (1995) 11 Cal.4th 568, 581.) The language of section 667.6, subdivision (d), requires that, in determining whether crimes against a single victim occurred on separate occasions, the trial court "shall consider" whether the defendant had a reasonable opportunity to reflect between the crimes. (§ 667.6, subd. (d).) Although this language does not make such factor a litmus test for determining the issue, the courts have nevertheless done so.

Thus, the question is whether the requirement that the defendant had a reasonable opportunity to reflect between sex acts is too vague to satisfy due process. We conclude it is not. A statute is not unconstitutionally vague "so long as an

accused can reasonably be held to understand by the terms of the statute that his conduct is prohibited." (*Bowland v. Municipal Court* (1976) 18 Cal.3d 479, 493.) It takes no particular depth of reasoning to be able to distinguish between a situation where a perpetrator engages in a continuous course of conduct involving multiple sex offenses with no break in between and one in which the individual offenses are separated by some other activity, either of the defendant or another, that interrupts the assault and affords the perpetrator an opportunity to reflect on what he or she is doing. The activity need not involve any type of movement of the victim and need not be of any particular duration. It may be nothing more than car lights going by that cause the perpetrator to pause and reflect before proceeding, as in *King*, or some activity not amounting to a sex offense, like pausing to listen to the victim's answering machine or punching the wall, as in *Plaza*. We believe a perpetrator can reasonably be held to recognize this distinction.

Having concluded a vagueness challenge to section 667.6, subdivision (d), should properly have been rejected, we need not consider defendant's alternate claim of ineffective assistance based on counsel's failure to raise the vagueness challenge.

III

Right to Jury Trial on Consecutive Sentencing

Defendant contends the imposition of full consecutive sentences based on facts not found by a jury, i.e., that the

offenses occurred on separate occasions, violated his Sixth Amendment rights under *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435]. Defendant acknowledges that both the United States Supreme Court, in *Oregon v. Ice* (2009) 555 U.S. 160 [172 L.Ed.2d 517], and the California Supreme Court, in *People v. Black* (2007) 41 Cal.4th 799, concluded the decision whether to run sentences consecutive or concurrent does not implicate a defendant's jury trial rights. However, defendant argues those cases were "premised on the assumption that the sentencing choice is a discretionary rather than a mandatory one." Defendant argues that where, as here, the factual finding *mandates* a particular sentencing scheme, the Sixth Amendment is implicated.

We are not persuaded. Although the sentencing choices in the foregoing cases were discretionary, that was not the basis of those decisions. In *Oregon v. Ice*, the court was faced with an Oregon sentencing scheme that made consecutive sentencing permissible only upon certain factual findings. (*Oregon v. Ice*, *supra*, 555 U.S. at p. 163 [172 L.Ed.2d at pp. 522-523].) The court concluded the determination of those facts by the sentencing court did not implicate the Sixth Amendment, not because the choice was discretionary, but because the choice was one that traditionally had been left to the trial judge rather than the jury. (*Id.* at pp. 163-164, 167-172 [172 L.Ed.2d at pp. 522, 524-527].) In *People v. Black*, the court explained that, once the jury makes the factual findings necessary for conviction of the separate offenses, the defendant is thereby

subject to the statutory maximum term available on each offense. Because the determination whether to impose those terms consecutively or concurrently results in an overall sentence within that maximum, the Sixth Amendment is not implicated. (*People v. Black*, *supra*, 41 Cal.4th at p. 823.)

Once the jury in this case convicted defendant of the various sex offenses, the maximum sentence to which he was subject included full consecutive sentencing. This is true whether the trial court utilized the mandatory provisions of section 676.6, subdivision (d), or the discretionary provisions of section 667.6, subdivision (c). That sentencing decision is one traditionally reserved to the sentencing judge, not a jury, and the factual findings underlying it do not implicate defendant's Sixth Amendment rights.

IV

Sufficiency of the Evidence of Rapes

Defendant was convicted of three rapes. He contends there is substantial evidence of only two rapes, separated by a forced sodomy for which he was not charged. Defendant argues the evidence shows he first penetrated the victim's vagina, after which he forced the victim to turn over and penetrated her anus, after which he again penetrated her vagina. In the alternative, defendant argues the trial court erred in failing to instruct the jury that sexual intercourse requires vaginal penetration.

The victim testified that, after defendant digitally penetrated her vagina and anus, he got on top of her face-to-

face and penetrated her vagina with his penis. Defendant then withdrew his penis from her vagina and ordered the victim to turn over. When she refused, he said she "had a choice between [her] ass and [her] mouth." The victim then turned over and defendant "inserted his penis into [her] again." When asked where he stuck his penis, the victim responded, "In my anus." However, after the second penetration, defendant put his finger in the victim's mouth, and she bit down on it, but not hard enough to break the skin. When asked why she didn't bite harder, the victim responded: "He said he was going to shove it in my ass. He took himself out of me and was rubbing himself on my butt." When asked what she was thinking at the time, the victim testified, "I thought he was going to sodomize me." The prosecutor then asked, "Did he ever again enter your, use his penis to enter your anus?" The victim answered, "No." The victim testified that, after defendant stopped rubbing himself on her, he reinserted his penis in her vagina. After some minutes he pulled out, moved up her body and ejaculated on her face.

In reviewing the sufficiency of the evidence supporting a conviction, we view the evidence in the light most favorable to the prosecution and determine if a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. (*People v. Davis* (1995) 10 Cal.4th 463, 509.) Reversal on the basis of insufficient evidence is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient

substantial evidence to support [the conviction]." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

The People contend there is sufficient evidence of three separate rapes. Regarding the second, the People acknowledge the victim at first testified defendant penetrated her anus with his penis. However, they point to the victim's later testimony about not biting down on defendant's finger harder for fear he would "shove it in [her] ass" and that, when defendant was rubbing his penis over her butt, the victim thought he might sodomize her. The People argue this testimony shows defendant had not yet sodomized the victim. The People also point to the following testimony during cross-examination regarding what happened after the victim refused to turn over:

"Q. What did he say?

"A. He said that I had a choice between my mouth and my ass.

"Q. That's what caused you to roll over at that point?

"A. Yes.

"Q. When you did that he entered you from the rear?

"A. Yes.

"Q. He entered your vagina from the rear?

"A. Yes."

Finally, the People rely on the testimony of the examining nurse who stated the victim told her there had been finger penetration of the anus, but no penile penetration.

"In determining whether a judgment is supported by substantial evidence, we may not confine our consideration to

isolated bits of evidence, but must view the whole record in a light most favorable to the judgment, resolving all evidentiary conflicts and drawing all reasonable inferences in favor of the decision of the [jury]. [Citation.] We may not substitute our view of the correct findings for those of the [jury]; rather, we must accept any reasonable interpretation of the evidence which supports the [jury]'s decision. However, we may not defer to that decision entirely. '[I]f the word "substantial" means anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with "any" evidence. It must be reasonable in nature, credible, and of solid value; it must actually be "substantial" proof of the essentials which the law requires in a particular case.' [Citations.]" (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1203-1204.)

The victim was obviously confused in her testimony. At one point she indicated defendant had penetrated her anus after she turned over. However, several times thereafter, she stated defendant had penetrated her vagina. The only contemporaneous statements we have from the victim were those to which the nurse testified, i.e., that there had been no anal penetration. Tellingly, neither party made a point of this during argument to the jury, thereby suggesting they recognized this case involved either three rapes or no offenses whatsoever.

But for the one contrary statement of the victim when first asked about the matter, there is no question that there is

substantial evidence from which a reasonable jury could conclude the second penetration was vaginal. In light of the totality of the other testimony, we believe the jury could rationally have disregarded the one stray comment and found three separate rapes. The jury was expressly instructed it could "believe all, part or none of any witnesses' [*sic*] testimony" and that they should "[c]onsider the testimony of each witness and decide how much of it you believe." It is the jury's function in our legal system to make these decisions when the evidence is conflicting. We will not lightly take that decision away from them. In the present matter, we conclude substantial evidence supports the rape conviction based on the second penile penetration.

Defendant argues in the alternative the trial court failed to instruct the jury that rape requires penile penetration of the vagina rather than the anus. He argues the jury here could have concluded the second penetration was of the anus but nevertheless believed this was sufficient for rape. Defendant is mistaken. After instructing the jury on the elements of rape, including that "defendant had sexual intercourse with a woman," the court explained: "Sexual intercourse means any penetration no matter how slight to the vagina or genitalia by the penis."

V

Sufficiency of the Evidence of "Separate Occasions"

As the basis for imposing full consecutive sentences on the three rapes, the trial court stated: "All right. The court did

preside over the trial, did take copious notes on the evidence, and has the evidence in mind. I find, based upon the evidence that was presented at the trial, that after the commission of the first forcible rape, [defendant] had a reasonable opportunity to reflect upon his actions, but nevertheless resumed sexually assaultive behavior by committing the two additional acts of forcible rape."

While the foregoing provides a rationale for imposing a full consecutive term on the second rape, it provides no basis for doing so on the third. Defendant contends the court was required to state such rationale on the record, citing *People v. Irvin* (1996) 43 Cal.App.4th 1063 (*Irvin*). In *Irvin*, the Court of Appeal concluded the trial court's statement of reasons for imposing full consecutive sentences did "not provide a sufficient analysis of the facts to allow [the Court of Appeal] to determine why it concluded all 20 sex offense acts must have occurred on 'separate occasions' within the meaning of subdivision (d)." (*Id.* at p. 1070.) The court remanded to give the trial court an opportunity to state its rationale as to each offense. (*Id.* at p. 1072.)

The People contend the trial court was not required to provide a statement of reasons for imposing full consecutive sentences. They cite *People v. Ramirez* (1987) 189 Cal.App.3d 603, at page 635. *Ramirez* in turn cited *People v. Craft* (1986) 41 Cal.3d 554, 559, where the state high court explained that, inasmuch as full consecutive sentencing under section 667.6, subdivision (d), is mandatory where the applicable circumstances

exist, the trial court need not provide a statement of reasons for invoking that provision.

Where the circumstances satisfy the requirements of section 667.6, subdivision (d), the imposition of full consecutive sentences is mandatory and the trial court need not state reasons for doing so. In the absence of an explanation on the record, we may infer the court made the requisite findings. However, where as in *Irvin*, the court undertakes to state reasons for invoking section 667.6, subdivision (d), but does so incompletely, the same inference may not be possible. That would appear to be the case here.

However, we need not decide in the present matter if the trial court was required to state reasons for imposing a full consecutive term on the third rape. As we shall explain, any such finding by the trial court would not be supported by substantial evidence.

Defendant contends the trial court erred in imposing full consecutive terms on both the second and third rapes. He argues that, once the sexual assault started, it did not stop, and that there was no interval between any of the offenses that afforded him an opportunity to reflect.

We disagree. The record shows that, after the first rape, defendant told the victim to turn over. When she refused, he gave her a choice between having him insert his penis in her mouth or in her anus. She then turned over as directed. At that point, defendant resumed his sexual assault. It cannot be gainsaid that, during the period defendant was trying to get the

victim to turn over, he had ample opportunity to reflect on what he was doing. Defendant did not engage in any other sexual conduct during this period.

The same cannot be said as to the third rape. After the second rape, defendant withdrew his penis from the victim's vagina and rubbed it on her buttocks. He then reinserted his penis in her vagina. There is no indication defendant ever discontinued his sexual assault during this interval. Thus, this is not a situation like *King*, where the defendant ceased groping the victim while a car drove by, or *Plaza*, where the defendant paused to listen to the victim's answering machine and punched a wall. After the pause to get the victim to turn over, there was no further interruption in defendant's sexual assault. Thus, the third rape did not occur on a separate occasion within the meaning of section 667.6, subdivision (d). The matter must be remanded for resentencing on the third rape.

DISPOSITION

The convictions are affirmed. The matter is remanded for resentencing on count 5. Following resentencing, the trial court shall amend the abstract of judgment and forward a

certified copy to the Department of Corrections and Rehabilitation.

HULL, J.

We concur:

RAYE, P. J.

BUTZ, J.