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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. STEPHEN DYSER, Defendant and Appellant.	C064558 (Super. Ct. No. 09F06605)

APPEAL from a judgment of the Superior Court of Sacramento County, David W. Abbott, Judge. Affirmed as modified.

Solomon Wollack, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Stephen G. Herndon and Peter W. Thompson, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts II through V.

Defendant Stephen Dyser was convicted of first degree robbery, first degree burglary, assault with intent to commit rape, assault with intent to commit rape during the commission of first degree burglary, assault with a deadly weapon (a knife) or by means of force likely to produce great bodily injury, and false imprisonment. He was sentenced to prison for a determinate term of seven years and a consecutive indeterminate term of seven years to life.

Defendant contends on appeal that (1) his convictions for first degree burglary and assault with intent to commit rape must be dismissed as lesser included offenses of assault with intent to commit rape during the commission of first degree burglary; (2) his convictions for assault with intent to commit rape and assault with intent to commit rape during the commission of first degree burglary are not supported by sufficient evidence of intent to commit rape or sodomy; (3) the trial court abused its discretion and violated defendant's due process rights when it admitted evidence of defendant's prior conviction for lewd touching of a child; (4) his trial counsel rendered ineffective assistance by failing to object when the trial court did not state reasons for imposing consecutive sentences on the convictions for first degree robbery and assault with intent to commit rape during the commission of first degree burglary; and (5) the abstract of judgment must be corrected to reflect a prison sentence of life with the possibility of parole, rather than seven years to life, for

assault with intent to commit rape during the commission of first degree burglary.

In the published portion of this opinion, we conclude (1) under the statutory elements test, first degree burglary and assault with intent to commit rape are both lesser included offenses of assault with intent to commit rape during the commission of first degree burglary. And in the unpublished portion of this opinion, we conclude (2) there was sufficient evidence of intent to commit rape because the jury could have inferred such intent from the fact that defendant straddled the victim's hips in her bed, held a knife to her throat, tried to turn her over, and told her he was not playing; (3) the trial court did not abuse its discretion or violate defendant's due process rights when it admitted evidence of defendant's prior conviction for lewd touching of a child, because the prior conviction had a direct connection to the issues in this case and the trial court's finding that the evidence was more probative than prejudicial was not arbitrary, capricious or absurd; (4) trial counsel did not render ineffective assistance in failing to object to consecutive sentences, because it is not reasonably probable that defendant would have fared any better had his trial counsel objected, and thus any deficiency by trial counsel could not have been prejudicial; and (5) the abstract of judgment must be changed to reflect a sentence of life with the possibility of parole.

We will modify the judgment.

BACKGROUND

On August 18, 2009, around 2:00 a.m., the victim arrived home following a night out with a friend. She undressed completely, put on a t-shirt, and climbed into bed while conversing with the friend on her cellular telephone. After talking until almost 3:00 a.m., she fell asleep with a bed sheet draped across her hips.

Around 15 minutes later, the victim woke to a strong smell of cigarettes and found defendant straddling her hips.[1] Defendant had his hand and a knife across her throat. The victim was groggy and thought she might be dreaming. When she realized it was not a dream, she asked defendant who he was and what he was doing. She thought he would rape and possibly kill her.

Defendant tried to turn the victim over by pressing the knife blade against her shoulder, but she would not turn. She kept telling him, "no, no. Wait. What are you doing? Please don't do anything." In response, he told her to "shut up, to be quiet and to turn over." Trying to buy time, she told him, "Okay. Okay. Just wait. I have to sneeze." Defendant put the knife blade between her lips and told her to be quiet; then he put the knife blade back to her throat.

The victim took a deep breath and tried unsuccessfully to scream. After taking another deep breath, she screamed as loud

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[1] Defendant concedes that his identity as the perpetrator is not at issue in this appeal.

as she could. She put her hand underneath the knife blade and tried to relieve its pressure against her throat. Defendant told her he wasn't "playing."

The victim screamed "Help me" and tried to push the knife blade away from her. Defendant jumped off of her. Her right hand had been cut by the knife. She kept screaming as he looked around the room. She moved toward the screen door of her residence hoping that someone would hear her yelling.

Defendant reached down by the victim's bed and repeatedly tried to grab her cell phone. Defendant succeeded on his third attempt. After grabbing the phone, he headed toward the door. The victim kept screaming. Defendant stopped, turned around, and hit the victim on the top of her head with the knife. She went to her stove, grabbed a small sauce pan, and tried to hit him as he fled out the door. She continued to scream until she heard a neighbor say they had telephoned 9-1-1.

The victim's cell phone was the only item missing from her apartment.

A jury convicted defendant of first degree robbery (Pen. Code,[2] §§ 211, 212.5, subd. (a); count one), first degree burglary (§§ 459, 460, subd. (a); count two), assault with intent to commit rape (§ 220, former subd. (a), now subd. (a)(1); count three), assault with intent to commit rape during the commission of first degree burglary (§ 220, subd. (b); count

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[2] Undesignated statutory references are to the Penal Code.

four), assault with a deadly weapon (a knife) or by means of force likely to produce great bodily injury (§ 245, subd. (a)(1); count five), and false imprisonment (§ 236; count six). The jury found that defendant used a knife in the commission of counts one, two, three, five, and six.[3]

On the count one conviction for first degree robbery, the trial court sentenced defendant to prison for a determinate term of seven years (the upper term of six years plus one year for use of a deadly weapon). On the count four conviction for assault with intent to commit rape during the commission of first degree burglary, the trial court sentenced defendant to a consecutive indeterminate term of seven years to life in prison. The trial court also imposed sentences on the remaining counts and enhancements, but stayed them pursuant to section 654.[4]

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[3] In counts one, two and six, the first amended information alleged that a principal was armed with a firearm. (§ 12022, subd. (a)(1).) The trial court amended the information by interlineation to allege section 12022, subdivision (b)(1), personal use of a deadly weapon. However, the trial court did not amend the typed phrase "armed with" to read "personally used." Defendant does not contend this failure to amend provided him insufficient notice or was otherwise prejudicial.

Count three alleged a knife use enhancement pursuant to section 12022.3, subdivision (a). Counts four and five did not include any enhancement. The count five verdict form mistakenly included a knife use enhancement and the jury found it true. However, the court did not impose (or impose and stay) the unpleaded enhancement.

[4] Defendant was awarded 204 days of custody credit and 30 days of conduct credit. The 2010 amendment to section 2933 does not entitle him to additional conduct credit because, among other things, he was ordered to register as a sex offender. (§ 2933, former subd. (e)(3).)

DISCUSSION

I

Defendant contends that his convictions for first degree burglary and assault with intent to commit rape are lesser included offenses of assault with intent to commit rape during the commission of first degree burglary. The Attorney General concedes this point only as to first degree burglary, but we agree with defendant as to both first degree burglary and assault with intent to commit rape.

In considering whether defendant may be convicted of multiple charged crimes, we apply the statutory elements test. (*People v. Reed* (2006) 38 Cal.4th 1224, 1231.) Under that test, a lesser offense is necessarily included in a greater offense if the statutory elements of the greater offense "'include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser.'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154, fn. 5, quoting *People v. Birks* (1998) 19 Cal.4th 108, 117.)

Accordingly, we begin by considering the statutory elements for each charged offense. For first degree burglary, section 459 provides in relevant part: "Every person who enters any house . . . with intent to commit . . . any felony is guilty of burglary." And section 460 provides in relevant part: "Every burglary of an inhabited dwelling house . . . is burglary of the first degree."

For assault with intent to commit rape, section 220, subdivision (a)(1) provides in relevant part: "Except as

provided in subdivision (b), any person who assaults another with intent to commit mayhem, rape, sodomy, oral copulation, or any violation of Section 264.1, 288, or 289 shall be punished by imprisonment in the state prison for two, four, or six years."

And for assault with intent to commit rape during the commission of first degree burglary, section 220, subdivision (b) provides in relevant part: "Any person who, in the commission of a burglary of the first degree, as defined in subdivision (a) of Section 460, assaults another with intent to commit rape, sodomy, oral copulation, or any violation of Section 264.1, 288, or 289 shall be punished by imprisonment in the state prison for life with the possibility of parole."

The Attorney General acknowledges that assault with intent to commit rape during the commission of first degree burglary cannot be committed without also committing first degree burglary. We agree. Section 220, subdivision (b) expressly provides that the prohibited offense must be committed "in the commission of a burglary of the first degree, as defined in subdivision (a) of Section 460." Thus, first degree burglary is a lesser included offense of section 220, subdivision (b).

The Attorney General argues, however, that the same is not true for violations of section 220, subdivisions (a) and (b). The Attorney General notes that section 220, subdivision (a)(1) can be violated by assaulting another with intent to commit mayhem. Mayhem is not listed in section 220, subdivision (b). Seizing on this difference, the Attorney General argues that a

violation of section 220, subdivision (a)(1) is only a lesser "related" offense.

But as we have explained, the applicable inquiry is whether the greater offense (§ 220, subd. (b)) can be committed without also committing the lesser offense (§ 220, subd. (a)(1)). (*People v. Breverman*, *supra*, 19 Cal.4th at p. 154, fn. 5.) The answer is no. All of the pertinent elements in subdivision (b) are also included in subdivision (a)(1). Thus, assault with intent to commit rape is a lesser included offense of assault with intent to commit rape during the commission of first degree burglary.

We will modify the judgment by dismissing counts two and three as lesser included offenses of count four.

II

Defendant also contends his convictions for assault with intent to commit rape and assault with intent to commit rape during the commission of first degree burglary are not supported by sufficient evidence of intent to commit rape or sodomy.

"On appeal, the test of legal sufficiency is whether there is substantial evidence, i.e., evidence from which a reasonable trier of fact could conclude that the prosecution sustained its burden of proof beyond a reasonable doubt. [Citations.] Evidence meeting this standard satisfies constitutional due process and reliability concerns. [Citations.] [¶] While the appellate court must determine that the supporting evidence is reasonable, inherently credible, and of solid value, the court must review the evidence in the light most favorable to the

[judgment], and must presume every fact the jury could reasonably have deduced from the evidence. [Citations.] Issues of witness credibility are for the jury. [Citations.]" (*People v. Boyer* (2006) 38 Cal.4th 412, 479-480.)

"If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*People v. Albillar* (2010) 51 Cal.4th 47, 60.)

A defendant's specific intent to commit a crime may be inferred from all of the facts and circumstances disclosed by the evidence. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1130, disapproved on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) "Intent is rarely susceptible of direct proof and usually must be inferred from the facts and circumstances surrounding the offense." (*People v. Pre* (2004) 117 Cal.App.4th 413, 420.)

In this case defendant, a complete stranger to the victim, entered her bedroom around 3:00 a.m. She awoke and found him straddling her. She told him, "no, no. Wait" and "Please don't do anything." In response, he told her to "shut up, to be quiet and to turn over." After she tried to scream, he put the knife between her lips, told her to be quiet, and told her that he wasn't "playing."

Defendant did not tell the victim that he would rape or sodomize her, but as we have noted, intent is rarely susceptible of direct proof such as a statement of intent to do the act.

(*People v. Pre*, *supra*, 117 Cal.App.4th at p. 420.) And although there is no evidence that defendant touched the victim in a sexual manner or tried to remove the bed sheet or her t-shirt, the absence of such conduct is not dispositive in this case, as it could be attributed to the victim's efforts to resist defendant's assault, rather than to defendant's lack of intent. (Cf. *People v. Pendleton* (1979) 25 Cal.3d 371, 377.)

Nonetheless, defendant argues there is "no basis -- other than speculation" to attribute this lack of evidence to the victim's resistance rather than to his own lack of intent. But the jury could have inferred intent to commit rape from the fact that defendant straddled the victim in her bed, held a knife to her throat, tried to turn her over, and told her he was not playing. These circumstances caused the victim to believe that defendant would rape her. We must view this evidence in the light most favorable to the judgment and we must draw inferences that the jury could have drawn in support of its verdict. (*People v. Boyer*, *supra*, 38 Cal.4th at pp. 479-480.)

Defendant argues that his efforts to get the victim to turn over "might well have been" based on his intent to simply "tie her up and rob the place." But even if that is a possible inference from the evidence, our standard of review requires us to draw inferences most favorable to the judgment in an effort to determine whether the circumstances reasonably justify the trier of fact's findings. (*People v. Boyer*, *supra*, 38 Cal.4th at pp. 479-480.)

Defendant also points to his "three successive attempts" to steal the cell phone. He says this establishes that the robbery was his "idea all along and that the idea of rape and sodomy never crossed his mind." Again, however, even if this is one possible inference, it does not eliminate the other possible inference that he harbored the intent to commit rape and then took the victim's cell phone to impede her ability to call for help or report his crimes.

Because we conclude that substantial evidence supports the convictions, it is not necessary to address defendant's additional contention that his prior 2004 conviction in Illinois, standing alone, is insufficient to support the convictions.

III

Defendant next argues that the trial court abused its discretion and violated his due process rights when it admitted evidence of his 2004 Illinois conviction involving lewd touching of a child.

The prosecution sought to admit the evidence of the prior conviction under Evidence Code sections 1101, subdivision (b) and 1108. The evidence consisted of a one-page information and a one-page stipulation that the information is a "certified record of conviction suffered by the defendant." The information recited that "defendant, knowing that [the prior victim] was unable to give knowing consent, committed an act of sexual conduct with [the prior victim], a child under 13 years of age, in that said defendant knowingly touched the buttocks of

[the prior victim] with his penis for the purpose of the sexual gratification of the defendant."

Defendant objected that the evidence was more prejudicial than probative. After argument by counsel, the trial court admitted the evidence of the prior conviction, explaining, "With respect to [Evidence Code section] 1108, the prior conviction is admissible specifically for the purpose to show propensity. And my Evidence Code Section 352 analysis is that for that purpose this record of conviction does have probative value. That probative value does outweigh any prejudicial effect. And the specific purpose of . . . Evidence Code Section 1108 is to show propensity for that purpose. And on that basis I'm going to overrule your objection and deny your motion to exclude this evidence under Evidence Code Section 1108. [¶] Under Evidence Code Section 1101(b), I also believe the evidence is admissible to show . . . intent and motive, not withstanding the lack of similarity between that conduct and the conduct that's at issue in this case. The facts of this case legitimately raise evidence of intent. [¶] Intent is an essential element of the charged offenses of assault with intent to commit rape and, as such, the prior conviction has probative value when it comes to allowing the jury to decide whether [defendant] . . . acted with the requisite intent to commit the offense charged. [¶] So on that basis I do believe that the probative value of the evidence outweighs the prejudicial effect and I have engaged in the Evidence Code Section 352 analysis that's required by both Evidence Code Section 1108 and 1101(b)."

Evidence Code section 1108 "permits a jury to consider prior incidents of sexual misconduct for the purpose of showing a defendant's propensity to commit offenses of the same type and essentially permits such evidence to be used in determining whether the defendant is guilty of a current sexual offense charge. [Citation.] Although before Evidence Code section 1108 was enacted, prior bad acts were inadmissible when their sole relevance was to prove a defendant's propensity to engage in criminal conduct [citations], its enactment created a statutory exception to the rule against the use of propensity evidence, allowing admission of evidence of other sexual offenses in cases charging such conduct to prove the defendant's disposition to commit the charged offense [citation]. The California Supreme Court has ruled that Evidence Code section 1108 is constitutional and does not violate a defendant's due process rights. [Citation.]

"However, because Evidence Code section 1108 conditions the introduction of uncharged sexual misconduct or offense evidence on whether it is admissible under Evidence Code section 352, any objection to such evidence, as well as any derivative due process assertion, necessarily depends on whether the trial court sufficiently and properly evaluated the proffered evidence under that section. 'A careful weighing of prejudice against probative value under [Evidence Code section 352] is essential to protect a defendant's due process right to a fundamentally fair trial. [Citations.]' [Citation.] As our Supreme Court stated in [*People v. Falsetta* (1999) 21 Cal.4th 903], in

balancing such Evidence Code section 1108 evidence under Evidence Code section 352, 'trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other . . . offenses, or excluding irrelevant though inflammatory details surrounding the offense. [Citations.]' [Citation.] In evaluating such evidence, the court must determine 'whether "[t]he testimony describing defendant's uncharged acts . . . was no stronger and no more inflammatory than the testimony concerning the charged offenses."' [Citation.]

"On appeal, we review the admission of other acts or crimes evidence under Evidence Code section 1108 for an abuse of the trial court's discretion. [Citation.] The determination as to whether the probative value of such evidence is substantially outweighed by the possibility of undue consumption of time, unfair prejudice or misleading the jury is 'entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence.' [Citation.] The weighing process under [Evidence Code] section 352 'depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic

rules.' [Citation.] '"The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying [Evidence Code] section 352, 'prejudicial' is not synonymous with 'damaging.'" [Citation.]' [Citation.] We will not find that a court abuses its discretion in admitting such other sexual acts evidence unless its ruling '"falls outside the bounds of reason." [Citation.]' [Citation.] In other words, we will disturb a trial court's ruling under Evidence Code section 352 only where the court has exercised its discretion in a manner that resulted in a miscarriage of justice. [Citation.]" (*People v. Dejourney* (2011) 192 Cal.App.4th 1091, 1103-1105; fns. omitted.)

Defendant contends the prior conviction had little probative value because it was dissimilar to the charged offense. However, "'[t]he charged and uncharged crimes need not be sufficiently similar that evidence of the latter would be admissible under . . . [Evidence Code] section 1101, otherwise . . . [Evidence Code] section 1108 would serve no purpose.'" (*People v. Mullens* (2004) 119 Cal.App.4th 648, 659, quoting *People v. Frazier* (2001) 89 Cal.App.4th 30, 40–41.) "With the enactment of [Evidence Code] section 1108, the Legislature 'declared that the willingness to commit a sexual offense is not common to most individuals; thus, evidence of any prior sexual offenses is particularly probative and necessary for determining

the credibility of the witness.' [Citation.]" (*People v. Soto* (1998) 64 Cal.App.4th 966, 983.)

Defendant counters that, without expert testimony, the jury could only guess at whether his prior touching of a child evidenced his propensity or predisposition to commit a forcible rape or sodomy of an adult. (Citing *People v. Earle* (2009) 172 Cal.App.4th 372, 397-398 (*Earle*).) As *Earle* explained, "[n]o layperson can do more than guess at the extent, if any, to which a person predisposed to one kind of deviant sexual conduct may be predisposed to *another* kind of deviant sexual conduct, criminal or otherwise." (*Id.* at p. 399.)

But here, the two "kinds" of sexual conduct are not nearly as dissimilar as the indecent exposure and sexual assault at issue in *Earle*. Defendant's prior act involved his knowingly touching the prior victim's buttocks with his penis. The present act involved his efforts to get the victim, who was on her back facing him, to turn over. If defendant had succeeded in forcing the victim to turn over, her buttocks would have been in proximity to his penis. These physical acts are not so dissimilar that only an expert could consider whether defendant was predisposed to this type of sexual conduct.

Defendant further asserts that the prior conviction was highly prejudicial because it involved the molestation of a child. But as we have noted, prejudicial evidence is evidence that tends uniquely to evoke an emotional bias against defendant while having little connection to the issues. (*People v. Dejourney*, *supra*, 192 Cal.App.4th at pp. 1103-1105.) Here, the

prior incident had a direct connection to the issues because it tended to explain defendant's efforts to get the victim to turn over. The trial court's finding that the probative value was not substantially outweighed by any prejudicial effect was not arbitrary, capricious, or patently absurd. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

Nonetheless, defendant further argues that because the evidence was substantially more prejudicial than probative, it infected the trial with unfairness and violated his right to due process under the Fourteenth Amendment to the United States Constitution. But we have rejected defendant's premise that the evidence infected the trial with unfairness, and we likewise reject his due process claim.

IV

In addition, defendant asserts that his trial counsel rendered ineffective assistance at sentencing when he failed to timely object that the trial court stated no reasons for imposing consecutive sentences for first degree robbery (count one) and assault with intent to commit rape during the commission of first degree burglary (count four).

The probation report identified six circumstances in aggravation and no circumstances in mitigation. Under the heading "Rule 4.425: Criteria Affecting Consecutive or Concurrent Sentences" (Cal. Rules of Court, Rule 4.425),[5] the

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[5] Undesignated rule references are to the California Rules of Court.

report stated: "(a)(1) The crime in Count 1 and its objective was predominantly independent of the crimes in Counts 2 through 6." The probation report recommended that defendant be committed to prison on count one for "the upper term of six years, consecutive. The upper term is being recommended as the defendant has engaged in violent conduct, which indicates a serious danger to society (Rule 4.421(b)(1))." The report also recommended one year consecutive for the knife enhancement. Regarding count four, the probation report recommended that defendant be committed to prison for "the indeterminate term of seven years to life, consecutive."

The trial court began the sentencing hearing by stating that it had reviewed the probation report. The trial court asked the attorneys if they had anything else they wanted the trial court to consider, and both responded in the negative.

Before pronouncing sentence, the trial court addressed defendant as follows: "Mr. Dyser, I have reviewed the materials and, of course, I sat through your entire trial. [¶] And let me just say that the offenses of which you stand convicted are some of the most serious offenses that affect our society. [¶] People need to be--to feel that they can be safe in their own homes and the conduct of which you stand convicted goes against that and is exactly counter to that. [¶] The victim in this case is--continues to suffer daily from what happened to her as the result of what you did and I see in the report where you indicated that you believe you are innocent. [¶] I want you to know before I pronounce sentence that there is no doubt in my

mind that you are guilty of these offenses." The trial court pronounced that defendant "is not eligible for probation and there are no unusual circumstances that would warrant a grant of probation. And even if there were unusual circumstances, probation would not be granted because of the violent nature of the offenses of which he stands convicted and his criminal record."

The trial court then stated: "[Stephen] Patrick Dyser, it is the judgment and sentence of this Court for violation of the offense charged in Count One, Penal Code [section] 211, robbery in the first degree that you be sentenced to the upper term in State prison of six years. [¶] The upper term is being recommended and is being imposed because you have engaged in violent conduct which indicates a danger to society." The trial court also imposed a one-year enhancement for knife use.

The trial court continued: "For violation of the offense charged in Count Four, Penal Code Section 220(b), assault with intent to commit rape during the commission of a First Degree Burglary you are sentenced to the indeterminate sentence of seven years to life, consecutive to the offense and sentence imposed in Count Number One."

Defendant's trial counsel did not object to any portion of the sentence.

"'"[I]n 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.' [Citation.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" [Citation.]'" (*People v. Avena* (1996) 13 Cal.4th 394, 418; fn. omitted.)

"A trial court must expressly state reasons for its decision to impose consecutive prison terms [citations] . . . ." (*People v. Tillotson* (2007) 157 Cal.App.4th 517, 545.) By failing to raise the issue at sentencing, defendant's trial counsel forfeited the issue of the trial court's failure to state reasons for consecutive terms. (*People v. Scott* (1994) 9 Cal.4th 331, 353.)

But even if trial counsel was deficient in failing to object, the Attorney General argues that the forfeiture was not prejudicial because the trial court followed the probation report's recommendations in all other respects and would have done so here had the point been brought to its attention. Defendant counters that the forfeiture was prejudicial because "the probation report, like the trial court, failed to give any reasons why consecutive sentences were appropriate."

Defendant is incorrect. The probation report stated that "[t]he crime in Count 1 and its objective was predominantly independent of the crimes in Counts 2 through 6." On its face, this is a reason why consecutive sentences would be appropriate.

Defense counsel could have objected that a finding of independence is factually unsupported because defendant's objective in taking the victim's cell phone was to prevent her from reporting the crimes, not to acquire a phone for some independent reason. Counsel plausibly could have argued that rule 4.425, subdivision (a)(1) did not favor consecutive sentences. However, rule 4.425, subdivision (b) provides that, except for facts that are elements of the crime, are used to impose the upper term, or are otherwise used to enhance the sentence, "[a]ny circumstance in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences."

The probation report noted five aggravating circumstances that were unrelated to the violence that was used to justify the upper term: planning, numerous and increasingly serious prior convictions, three prior prison terms, status on probation at the time of the offenses, and unsatisfactory prior performance on probation and parole. (Rule 4.421, subds. (a)(8), (b)(2), (b)(3), (b)(4), (b)(5).) No circumstances in mitigation were noted. Thus, had trial counsel argued that there was a flaw in the probation report's finding of independent objectives, the trial court could have cited any or all of these aggravating circumstances to justify consecutive sentences.

It is not reasonably probable that defendant would have fared any better had his trial counsel objected that the trial court failed to state any reason justifying consecutive terms, or that the reason offered in the probation report was factually

incorrect. Any deficiency in defense counsel's performance could not have been prejudicial. (*People v. Avena*, *supra*, 13 Cal.4th at p. 418.)

V

Defendant contends that the abstract of judgment must be corrected to reflect a prison sentence on count four (assault with intent to commit rape during the commission of first degree burglary) of life with the possibility of parole, rather than seven years to life in prison. The Attorney General agrees, and so do we. (§ 220, subd. (b).) We will direct the trial court to make this change to the abstract of judgment.

DISPOSITION

The judgment is modified to dismiss counts two and three as lesser included offenses of count four. As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment omitting counts two and three and reflecting a term of life in prison with the possibility of parole on count four. The trial court shall forward a certified copy of the amended abstract of judgment to the California Department of Corrections and Rehabilitation.

MAURO, J.

We concur:

RAYE, P. J.

BUTZ, J.