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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

ROGELIO GERARDO MORA NUNEZ,

Defendant and Appellant.

B278655

(Los Angeles County  
Super. Ct. No. YA091610)

APPEAL from a judgment of the Superior Court of Los Angeles County. Steven R. Van Sicklen, Judge. Affirmed.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Zee Rodriguez and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

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Rogelio Gerardo Mora Nunez appeals from the judgment entered following a jury trial that resulted in his conviction of forcible rape (Pen. Code, § 261, subd. (a)(2); count 1),<sup>1</sup> corporal injury to a girlfriend (§ 273.5, subd. (a); count 2), and false imprisonment (§ 236; count 3). On appeal, Nunez contends there was insufficient evidence to support the finding that he committed forcible rape. He also argues that the sentences on counts 2 and 3 should be stayed under section 654. We affirm the judgment.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### ***The People's Evidence***

#### *1. Norah Doe<sup>2</sup>*

Norah met Nunez in April of 2014 on a dating website. They communicated via text messaging and phone calls. In July 2014, they met in person and began dating. The relationship became exclusive and they saw each other at least twice a week.

Initially, the couple had a “positive” sexual relationship. By mutual consent, they used sex toys, whips, and ropes. Nobody was physically hurt. They often debated on whether to perform certain sexual acts. If Norah did not want to engage in a certain sexual act with Nunez, he would discuss the idea with her and try to convince her why he thought she should.

For example, Norah advised Nunez that she did not want to participate in anal sex. After Nunez pressured her, she eventually agreed to do it. When discussing anal sex with Nunez, she never told him “stop it,” “you’re pressuring me,” “leave me

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<sup>1</sup> All further references are to the Penal Code.

<sup>2</sup> Due to the nature of the offense, the last name of the victim has been omitted.

alone,” or “don’t do this to me.” She never felt like she was forced to engage in anal sex. They also discussed whether Norah liked to be dominated. Norah told Nunez that she preferred for him to be the person who takes the lead.

A few months into relationship, both Norah and Nunez tested positive for an sexually transmitted disease. After Norah was treated, she told Nunez she only wanted to engage in protected sex. Nunez didn’t like the idea and told Norah that “down the line” he wanted to discontinue using condoms. They continued to date exclusively.

On or about November 19, 2014, they kissed and engaged in foreplay, and Nunez began to have unprotected vaginal sex with Norah. During the act, Norah told Nunez to stop and he stopped. They instead had unprotected oral sex.

On November 22, 2014, Norah and Nunez decided to have a night out. Around 6:00 p.m., Norah arrived at Nunez’s apartment in Manhattan Beach, where they each consumed an alcoholic drink. Then, they went to a friend’s apartment, where they continued to drink alcoholic beverages. After that, they went to a restaurant/bar called Nick’s with the friend to celebrate a birthday, where they ate appetizers and continued to drink alcoholic beverages. They went to several bars after that and continued to drink alcohol. A little before 2:00 a.m., they decided to go back to Nunez’s apartment.

Norah got into bed wearing her bra and underwear; Nunez was naked. In bed, Nunez started rubbing against Norah’s body and removed her clothes. Norah reminded him that if they were going to engage in sex, he would need to use a condom. Nunez started to debate with Norah, telling her it didn’t make sense for him to use a condom because they both had been treated and

were clean. In response, Norah stated, “That is the way I feel,” and “I don’t feel comfortable doing this without a condom.”

Nunez continued to move closer to Norah and became “verbally aggressive.” At that point, she became uncomfortable and went to the restroom and put her bra and underwear back on. When Norah returned to the bed, Nunez got upset and he “aggressively” took off her bra and underwear. He then pinned her arms back and used his leg to pry her leg’s apart. Norah was scared and told him, “Please don’t do this,” and she asked him to stop. She called for help and while she was yelling, Nunez took his hand and “forcefully” covered her mouth and pinched her nose shut so she couldn’t breathe. Norah thought she was going to die.

Nunez then removed his hands from her face, and Norah asked him if she was going to make it out alive, and he didn’t respond. She started yelling again, and he covered her mouth and pinched her nose shut again so she couldn’t breathe. After he released his hands, Norah asked him if she had sex with him if he would let her leave, and he responded “Yes.” She then turned over on her stomach so she wouldn’t have to face him, and he had unprotected vaginal sex with her. Nunez ejaculated on her back, buttocks, and hair.

After he ejaculated, Nunez wrapped his legs around Norah so she couldn’t move. She then asked him if she could leave, and he responded, “No.” Eventually Nunez fell asleep and Norah was able to grab her dress and purse and leave his apartment. Norah felt like it took at least 20 minutes for Nunez to fall asleep, but it could have been longer. She left her bra, underwear and shoes at his apartment.

Once outside, although it would have been easier for Norah to get to her car through an alley, she went to the busy street because she was afraid he was going to catch her. At about 4:00 a.m., as Norah was getting to her car, she called her friend Brittany, who told her to call the police. Norah called 911.

That morning, Norah went to the Manhattan Beach police station to speak with Detective Michael Rosenberger. At the station, Norah agreed to call Nunez. The police also took pictures of Norah's injuries. Norah's legs hurt and she had a scratch on the back of her leg. She also had a limp in her leg, and a bruise on the back of her arm. Her nose hurt a lot, and an officer pointed out to her that she had a scratch on her neck.

### *2. Detective Rosenberger*

On November 23, 2014, Detective Rosenberger received a call regarding a case that had just occurred in the City of Manhattan Beach. He spoke with Norah about the incident and asked her to place a call to Nunez as part of the investigation. The conversation between Norah and Nunez was recorded. During the call, Nunez stated that he "was a dick last night" and that he "acted like a complete idiot." Another police officer then took Norah to see a nurse for an examination.

### *3. Susan Barie*

On November 23, 2014, at approximately 9:25 a.m., Susan Barie, a registered nurse, examined Norah. Barie noticed abrasions on the left side of Norah's neck and on her right leg. Norah also had bruises on her right leg, right knee, inner thighs, and left buttock. During an examination of Norah's vagina, Barie found abrasions on Norah's left labia minora. Barie determined that Norah's injuries were consistent with Norah's description of the incident with Nunez.

### ***The Defense Evidence***

Nunez called one witness, Amber Howard, his neighbor at his apartment complex for the past two years. Howard testified that the walls in the building were very thin. She could hear Nunez play music, take a shower, and the sound of his fan. She could also hear “muffled” conversations.

On November 22, 2014, Howard met Nunez for the first time at a birthday party at Nick’s, where she was introduced to him through a friend of a friend. She also met Norah. Howard observed both Nunez and Norah drinking, and thought they seemed like a “typical” couple.

That night, when Howard returned back to her apartment, she heard two people having sex. She heard a female “moaning” in pleasure. Howard did not hear anyone scream for help.

### ***The Verdict and Sentencing***

The jury convicted Nunez of forcible rape (§ 261, subd. (a)(2); count 1), corporal injury to a girlfriend (§ 273.5, subd. (a), count 2), and false imprisonment (§ 236; count 3). The trial court sentenced Nunez to the midterm of six years in state prison for count 1. The court then imposed concurrent midterms of three years for count 2, and two years for count 3.

Nunez filed a timely notice of appeal.

## **DISCUSSION**

### **I. Sufficient Evidence Supported the Jury’s Finding that Nunez Committed Forcible Rape**

Given the relationship between Nunez and Norah and the history of their sexual encounters, Nunez argues no rational trier of fact could have concluded, beyond a reasonable doubt, that he did not actually and reasonably believe Norah consented to the act of sexual intercourse. We disagree.

### *A. Standard of Review*

“To determine whether sufficient evidence supports a jury verdict, a reviewing court reviews the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable jury could find the defendant guilty beyond a reasonable doubt.’ [Citation.]” (*People v. Smith* (2014) 60 Cal.4th 603, 617.) “ ‘ “[I]t is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness’s credibility for that of the fact finder. [Citations.]” [Citation.]’ [Citation.]” (*People v. White* (2014) 230 Cal.App.4th 305, 315, fn. 13.)

### *B. Analysis*

Section 261, subdivision (a)(2) defines “rape” as “an act of sexual intercourse accomplished with a person not the spouse of the perpetrator” that is “against a person’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.” (§ 261, subd. (a)(2).) “[A] defendant’s reasonable and good faith mistake of fact regarding a person’s consent to sexual intercourse is a defense to rape.” (*People v. Williams* (1992) 4 Cal.4th 354, 360, relying on *People v. Mayberry* (1975) 15 Cal.3d 143, 155 (*Mayberry*).)<sup>3</sup> To

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<sup>3</sup> There is no dispute the jury was properly instructed with the *Mayberry* defense, as follows: “The defendant is not guilty of rape if he actually and reasonably believes or believed that the woman consented to the intercourse and actually and reasonably believed that she consented throughout the act of intercourse.

give consent, a “person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.”

(§ 261.6.) “Actual consent must be distinguished from submission. For instance, a victim’s decision to submit to an attacker’s sexual demands out of fear of bodily injury is not consent (citations) because the decision is not freely and voluntarily made (§ 261.6).” (*People v. Giardino* (2000) 82 Cal.App.4th 454, 460, fn. 3.)

Here, after Norah told Nunez that she did not want to engage in unprotected sex, he “aggressively” took off her bra and underwear. He then pinned her arms back and used his legs to pry her leg’s apart. Although Norah asked him to stop and called for help, Nunez instead “forcefully” covered her mouth and pinched her nose shut so she could not breathe. When he removed his hands from her face, Norah asked him if she was going to make it out alive, and he did not respond, causing Norah to yell for help again. At that point, in fear that she was going to die, Norah asked Nunez if he would let her go if she agreed to have sex with him, and he responded, “Yes.” It was only then she allowed him to have vaginal sex with her.

As a result of the incident, Norah suffered abrasions on her neck, leg, and labia minor, and had bruises on her leg, arm, inner thigh, knee, and buttock. She also had a limp in her leg and her nose hurt a lot.

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The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the woman consented. If the People have not met this burden, you must find the defendant not guilty.”



This evidence, taken as a whole and viewed in the light most favorable to the judgment, was more than sufficient for the jury to reasonably conclude Nunez committed forcible rape. (*People v. Young* (2005) 34 Cal.4th 1149, 1181 [“[U]nless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction.”].)

## **II. Section 654 Did Not Preclude the Trial Court From Imposing Separate Sentences on Counts 2 and 3**

Nunez contends the acts of corporal injury to a girlfriend (count 2) and false imprisonment (count 3) were incidental to his single objective of engaging in sexual intercourse. He argues the sentences for count 2 and count 3 must be stayed under section 654.

### *A. Standard of Review*

Section 654 provides, “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” (§ 654, subd. (a); *People v. Harrison* (1989) 48 Cal.3d 321, 335 (*Harrison*).) This prohibition against multiple punishment extends to situations in which several offenses are committed during “‘a course of conduct deemed to be indivisible in time’” or in which the defendant had only a single intent and all of the offenses were incidental to that one objective. (*Harrison, supra*, at p. 335.) However, “a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment.” (*People v. Beamon* (1973) 8 Cal.3d 625, 639, fn. 11.) Courts must consider whether the defendant had an opportunity

to reflect upon and renew his intent before committing the next offense and whether each offense created a new risk of harm. (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935; *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1255.)

A trial court is vested with broad latitude to decide if section 654 applies in a given case. “In the absence of an explicit ruling by the trial court at sentencing, we infer that the court made the finding appropriate to the sentence it imposed, i.e., either applying section 654 or not applying it.” (*People v. Mejia* (2017) 9 Cal.App.5th 1036, 1045 (*Mejia*).) Its findings will not be reversed on appeal if there is substantial evidence to support them. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) We view the evidence in the light most favorable to a respondent and presume in support of the sentence the existence of every fact the trial court reasonably could have deduced from the evidence. (*People v. Tarris* (2009) 180 Cal.App.4th 612, 627.)

#### *B. Analysis*

Nunez’s reliance on *Mejia*, *supra*, 9 Cal.App.4th at pages 1044–1045, for the proposition that section 654 precludes separate punishment for rape and corporal injury is misplaced. In *Mejia*, the defendant was convicted of spousal rape, infliction of corporal injury on a spouse, criminal threats, and torture.<sup>4</sup>

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<sup>4</sup> “Torture require[d] the infliction of great bodily injury with the intent to cause cruel or extreme pain and suffering. (§ 206.) To satisfy that element, the statute necessarily require[d] the intentional commission of one or more assaultive acts, such as infliction of corporal injury on a spouse, committed with the intent to cause cruel or extreme pain and suffering. Accordingly, although a defendant may be convicted of both torture and of any or all of the underlying acts (citation), section 654 preclude[d] imposition of unstayed sentences for both torture and any of the

(*Mejia, supra*, at p. 1039.) The issue before the Court of Appeal was whether the defendant's acts of spousal rape and of infliction of corporal injury on a spouse were included among the acts underlying the torture count. (*Id.* at p. 1046.) Because there was no evidence that defendant's acts were not a part of the torture course of conduct, nor did the prosecutor seek to distinguish any of those acts on that basis, section 654 precluded imposition of unstayed sentences on those counts. (*Ibid.*)

Here, by contrast, Nunez was not convicted of torture, and the reasoning in *Mejia* is inapplicable to his situation. Instead, substantial evidence supports a finding that the offenses consisted of separate acts to which separate punishments applied. First, Nunez pinned Norah's arms back and pried her leg's apart. While she screamed for help, he covered her mouth and pinched her nose so she couldn't breathe. Second, Norah negotiated her eventual release by agreeing to have sex with Nunez. After turning over on her stomach so she wouldn't have to face him, he penetrated her. Third, after he ejaculated on her, Nunez wrapped his legs around Norah and told her she couldn't leave. Although the three incidents occurred in rapid succession, each offense created a new risk of harm. (*Harrison, supra*, 48 Cal.3d at p. 335 [the temporal proximity of the events does not mean they were part of one indivisible course of conduct].)

Nunez's act of assaulting Norah was to prevent her from yelling for help, and was not incidental to the offense of rape. Nunez had the opportunity to reflect before he took advantage of her fear and raped her. Once he ejaculated, Nunez's intent in

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underlying assaultive offenses upon which the prosecution relie[d] to prove that element.” (*Mejia, supra*, 9 Cal.App.5th at pp. 1044–1045.)

wrapping his legs around Norah was to prevent her from leaving. Thus, the trial court was entitled to conclude that each act was separate, and section 654 did not preclude separate sentences.

**DISPOSITION**

The judgment is affirmed.

BIGELOW, P.J.

We concur:

RUBIN, J.

GRIMES, J.