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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DION DANTE BANKS, Defendant and Appellant.	B255093 (Los Angeles County Super. Ct. No. MA057659)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Blanchard, Judge. Affirmed as modified, in part; reversed in part.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

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Dion Dante Banks challenges his sentence of 84 years eight months to life following his conviction of multiple counts arising from two assaults in September 2012. He raises various errors. We find his conviction for burglary must be reversed, but we otherwise reject his contentions. We correct errors in the abstract of judgment and, with the exception of the burglary count, affirm the judgment as modified.

PROCEDURAL BACKGROUND

Appellant was charged with seven felonies arising out of the two September 2012 assaults. For the first assault occurring on September 5, 2012, against victim D.R., he was charged with assault with the intent to commit rape, sodomy, oral copulation, or any violation of Penal Code sections 264.1, 288, or 289[1] during the commission of a first degree burglary (§ 220, subd. (b); count 1); forcible oral copulation (§ 288a, subd. (c)(2)(A); count 2); sexual penetration by foreign object (§ 289, subd. (a)(1)(A); count 3); false imprisonment by violence (§ 236; count 4); and first degree residential burglary (§ 459; count 5). For the second assault occurring on September 13, 2012, against victim Monique A., he was charged with assault with a deadly weapon (§ 245, subd. (a)(1); count 6) and battery with serious bodily injury (§ 243, subd. (d); count 7). Various enhancements were also alleged: for counts 1, 2, 3, 4, and 7, it was alleged appellant used a deadly and dangerous weapon (a knife) (§ 12022, subd. (b)(1)); for counts 2 and 3, it was alleged appellant was subject to the "One Strike" law (§ 667.61, subds. (a), (c), (d), & (e)); and for count 6, it was alleged appellant personally inflicted great bodily injury (§ 12022.7, subd. (a)). It was further alleged appellant had suffered a prior felony conviction under the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), a prior serious felony conviction (§ 667, subd. (a)(1)), and three prior prison terms (§ 667.5, subd. (b)).

Following trial, a jury found appellant guilty of counts 1 through 6 and of the lesser included offense of misdemeanor battery for count 7. It also found true all special allegations except the great bodily injury allegation on count 6.

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[1] All undesignated statutory citations are to the Penal Code unless otherwise noted.

The trial court sentenced him to 84 years eight months to life as follows: count 1—20 years to life, consisting of 14 years to life in prison, plus one year for the deadly weapon use, plus five years for the prior serious felony; count 2—55 years to life, consisting of 25 years to life doubled as a second strike, plus five years for the prior serious felony; count 4—one year eight months, consisting of eight months (one-third the midterm) doubled, plus four months for the deadly weapon use; and count 6—eight years, consisting of four years doubled as a second strike. The court imposed but stayed appellant's sentence on count 3 (55 years to life as in count 2), count 5 (12 years, consisting of six years doubled as a second strike), and count 7 (90 days in county jail), and stayed the weapon use enhancement in count 2. (§ 654.) The court imposed various fines, fees, and credits discussed as needed, *post*. Appellant timely appealed.

FACTUAL BACKGROUND

1. D.R. Incident—September 5, 2012

D.R. was a prostitute who advertised her services on the website backpage.com. In response to the advertisement, on September 5, 2012, appellant met her at the Lancaster E-Z 8 Motel, where she lived. After he arrived, he took his clothes off and suddenly pulled out a knife and pointed it at her stomach, saying if she screamed he would hurt her. He forced her to lie on the bed. Crying and scared, she said she would do anything he wanted and pleaded with him not to hurt her. He removed her underwear, flipped her onto her back, and orally copulated her, penetrating her with his tongue. He also licked her toes.

Her cell phone rang and appellant let her answer it, while pointing the knife toward her stomach. She hung up and told appellant her "baby daddy" was coming to the room so he had to leave. Appellant got angry and poked the knife at her, claiming she was trying to "play" him. He dressed while yelling at her and told her to go into the bathroom and count to 120. When she emerged, he was gone, along with her laptop, purses, bag of clothes, two pairs of shoes, and her boyfriend's shoes.

She called motel security, who called the police. She told the security guard a man put a knife to her throat, raped her, and robbed her. She went to the hospital, and

when she returned, one of her purses had reappeared in the hotel room, but other items were missing, including the charger to her laptop, another pair of shoes, chips, and a case of soda.

The security guard later found a man matching D.R.'s description in the back of the motel, whom the guard identified as appellant. Appellant told the guard he was staying in the same room number occupied by D.R. When the guard asked for identification, appellant fled.

DNA analysis revealed appellant was a possible DNA contributor at several locations on D.R.'s body, including her anal area and left breast, and a major contributor to her right breast and left and right toes. In an interview with police, D.R. identified appellant from a six-pack photographic lineup.

2. Monique A. Incident—September 13, 2012

Also in response to an advertisement on backpage.com, appellant met Monique R. at the Bonair Hotel in Lancaster on September 13, 2012. He acted nervous when he entered the room. He sat on the bed next to her and attacked her. She kicked him with her high-heeled shoes and he told her to be quiet or he would kill her. She started screaming. He then stabbed her in the back of the leg with a knife. Officers responded to the hotel and interviewed Monique and saw a half-inch laceration to her inner left thigh. More than a year later at trial, Monique still had a painful scar.

3. Defense Case

Appellant testified in his defense, confirming he met both women through backpage.com and arranged to pay them for sexual services. He denied having any weapons during either encounter.

With regard to D.R., he told her she was too pretty to be a prostitute and he did not want to have sex with her, although he would still pay her. D.R. told him her "baby dad" beat her, she wanted to leave him, and she worked as a prostitute to provide for her son. The two then sat on the bed and talked. D.R. was "kinda emotional." Appellant helped put lotion on her legs, toes, and feet because she had just finished showering. As he applied the lotion, D.R.'s cell phone rang and she answered. After she hung up, she said

her "baby dad" was on his way to her room. Appellant got ready to leave and D.R. gave him three bags of clothes and other items to take with him. She told him she would call him in an hour to come back. He went home.

About an hour and a half later, D.R. texted him to return. He parked across the street from the motel and waited. She told him not to come to the motel parking lot because the police were there. After the police left, she texted him to come up to her room. He did, but he became nervous because D.R. was not there. She then texted him that she was on a "date." D.R. instructed him to get the key in one of her bags so he could let himself into her room. He entered the vacant room and waited for her, eating a bag of chips and drinking a soda from the minifridge. After 10 or 15 minutes, he went to his car and brought D.R.'s bags to her room. He felt she was "playing games," so he left. She later texted him, and they exchanged pictures. He heard from her "baby daddy" a day later, who threatened to kill him because of the story D.R. had told him.

Appellant denied kissing D.R. or putting saliva on different parts of her body. He did not recall telling a detective he kissed D.R.'s arm or had sexual contact with her and he claimed the only item of his own clothing he removed was his cardigan sweater. He denied telling the detective he stole D.R.'s laptop, although he admitted he kept it when he returned D.R.'s other belongings. He eventually sold it at a pawn shop because he could not return it in light of threats from D.R.'s child's father.

With regard to Monique, when appellant entered her hotel room, he smelled marijuana and saw a bottle of alcohol on the dresser. He felt uneasy, suspecting someone else had been there and it might have been a "set-up." When he turned to leave, Monique blocked the door, so he pushed her out of the way and she fell onto the bed. She kicked him. As he opened the door, he saw her about to kick him again, so he "batted her legs down." He was carrying a ring of keys, which he believed might have scratched her when he defended himself. He claimed she was not injured when he entered or exited the room.

Appellant admitted numerous prior convictions, including a 2001 conviction for robbery, a 2003 misdemeanor conviction for giving false identification to a police officer,

a 2006 conviction for being a felon in possession of a firearm, and a 2009 conviction for assault by means of force likely to produce great bodily injury.

DISCUSSION

1. Merger of Counts 1, 2, 3, and 5

Appellant contends the trial court violated double jeopardy principles and erred by not merging his conviction on count 1 (§ 220, subd. (b) [assault with intent to commit oral copulation or a violation of § 289 during the commission of a first degree burglary]) with his convictions on count 2 (§ 288a, subd. (c)(2)(A) [forcible oral copulation]) and count 3 (§ 289, subd. (a)(1)(A) [sexual penetration by foreign object]). Rather confusingly, he contends in his opening brief that count 1 was a lesser included offense of counts 2 and 3, and in his reply brief he argues the reverse, that counts 2 and 3 were lesser included offenses of count 1. Neither contention is correct.

A defendant may be charged with and convicted of multiple counts arising from a single act or course of conduct, unless one offense is necessarily included in another. (§ 954; *People v. Sanders* (2012) 55 Cal.4th 731, 736 (*Sanders*).) "'In deciding whether multiple conviction is proper, a court should consider only the statutory elements.' [Citation.] 'Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former.' [Citation.] In other words, '"[i]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former."'" (*Id.* at p. 737.) In making this determination, "we do not consider the underlying facts of the case or the language of the accusatory pleading." (*Id.* at p. 739.)

As relevant to count 1, section 220, subdivision (b) states, "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 . . . oral copulation, or any violation of Section . . . 289 shall be punished by imprisonment in the state prison for life with the possibility of parole." For count 2, section 288a, subdivision (c)(2)(A) provides, "Any person who commits an act of oral copulation when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily

injury on the victim or another person shall be punished by imprisonment in the state prison for three, six, or eight years." And for count 3, section 289, subdivision (a)(1)(A) provides, "Any person who commits an act of sexual penetration when that act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for three, six, or eight years."

Counts 2 and 3 were not lesser included offenses of count 1 because section 220, subdivision (b) requires only an assault with the *intent* to commit oral copulation or sexual penetration, not the completed acts, whereas both section 288a, subdivision (c)(2)(A) and section 289, subdivision (a)(1)(A) require completed acts of oral copulation and sexual penetration. (§ 288a, subd. (a) [defining oral copulation as "the act of copulating the mouth of one person with the sexual organ or anus of another person"]; § 289, subd. (k)(1) [defining sexual penetration as "the penetration, however slight, of the genital or anal opening of any person or causing another person to so penetrate the defendant's or another person's genital or anal opening for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument, or by any unknown object"].) Similarly, count 1 was not a lesser included offense of counts 2 and 3 because section 220, subdivision (b) contains an extra element not present in section 288a, subdivision (c)(2)(A) and section 289, subdivision (a)(1)(A): the assault with intent to commit a sex crime must be committed *in the commission of a burglary of the first degree*. The cases appellant cites are not on point because they did not involve assault with intent to commit a sex offense in the commission of a burglary. (See *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1476-1477; *People v. Ramirez* (1969) 2 Cal.App.3d 345, 353; *People v. Brown* (1948) 87 Cal.App.2d 281, 286-287.)

Appellant also argues his conviction on count 5 (§ 459 [first degree burglary]) should have been merged with his conviction on count 1 because count 5 was a lesser included offense of count 1. He is correct first degree burglary is a lesser included offense of assault with intent to commit a sex crime during the commission of a first degree burglary under section 220, subdivision (b). (*People v. Dyser* (2012) 202

Cal.App.4th 1015, 1020.) Respondent argues separate convictions were nevertheless proper because the evidence showed appellant committed two separate burglaries—the first when he initially entered D.R.'s hotel room with the intent to commit a felony, and the second when he left and returned later and stole additional items, including a laptop charger, a pair of shoes, chips, and a case of soda. (See *Sanders, supra*, 55 Cal.4th at p. 736 [lesser included offenses must arise out of the "same act or course of conduct"].)

We decline to accept respondent's post hoc rationale for count 5. Respondent's argument implies appellant entered D.R.'s room the second time with the intent to steal, but there is nothing in the record to suggest the prosecution presented that theory to the jury. For example, the jury instruction for count 5 did not include an intent to steal, and instead defined burglary to require, "[a]t the time of the entry, that person had the specific intent to commit the crime of oral copulation, sexual penetration by a foreign object, or assault with a deadly weapon," which was consistent with appellant's initial entry into D.R.'s room. Further, the prosecutor did not point out in closing arguments that two separate burglaries occurred; he merely remarked in opening comments that appellant "came back to her room after she was transported to Antelope Valley Hospital and he stole more of her belongings, including her food." In arguing the burglary count, the prosecutor emphasized appellant's intent with regard to his initial entry, explaining, "That's why he talked to this person on backpage; that's why he found out if she had a pimp or not; that's why he armed himself; and that's when he went over there within minutes of doing that. Of course that was his intent. He even said he went over there for sex." The trial court also apparently agreed count 5 was based upon the same burglary supporting count 1 because it stayed the sentence on count 5 under section 654. (*People v. Rodriguez* (2009) 47 Cal.4th 501, 507 (*Rodriguez*) [sentence must be stayed under § 654 when the offenses occurred during the same course of conduct pursuant to one objective].) Because count 5 was a lesser included offense to count 1, it must be reversed. (*People v. Ortega* (1998) 19 Cal.4th 686, 700.)

2. Consecutive Terms

Appellant contends the trial court erred in imposing consecutive sentences on counts 1, 2, and 4 because the court did not understand it had discretion to impose them as concurrent. Respondent contends appellant forfeited any challenge to the trial court's exercise of discretion by not objecting in the trial court. (See *People v. Powell* (2011) 194 Cal.App.4th 1268, 1297-1298 (*Powell*).) Appellant responds that his challenge is not to the trial court's discretionary sentencing choices, but to the trial court's failure to understand it had discretion, which requires remand. We will assume appellant has not forfeited his challenge because we find it lacks merit.[2]

At sentencing, the trial court must "state the reasons for its sentence choice on the record at the time of sentencing." (§ 1170, subd. (c); see Cal. Rules of Court, rule 4.406(b)(5) [statement of reasons required for imposing consecutive sentences].) "'The decision to impose consecutive rather than concurrent sentences is a "sentencing choice" within the meaning of [section 1170, subdivision (c)]. [Citations.] An express statement of reasons is required to support such a choice.'" (*Powell*, *supra*, 194 Cal.App.4th at p. 1297.) Here, the trial court did not state its reasons on the record for imposing consecutive sentences on counts 1, 2, and 4.[3] Instead, the court held an unreported in-chambers conference with counsel "to go over some of the intricacies of the sentencing" in the case. Back on the record, the court asked if either party wanted to be heard "in terms of 654 and everything like that," but indicated "we are all at least in accord as to

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[2] Even if we found forfeiture, we would address the merits because appellant argues his counsel was ineffective for failing to object. To substantiate that claim, appellant must show "deficient performance under an objective standard of reasonableness and prejudice under a test of reasonable probability of an adverse effect on the outcome." (*Powell, supra,* 194 Cal.App.4th at p. 1298, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) Because appellant's claim lacks merit, counsel was not ineffective for failing to object on that basis.

[3] As we interpret appellant's brief, he is not arguing the trial court abused its discretion in failing to cite reasons on the record. Thus, we do not address respondent's arguments on that point.

what the sentence in each count will be under the law." The People submitted on the issue and defense counsel submitted "[b]ased upon our conversation in chambers." Neither party submitted a sentencing memorandum and the parties stipulated the court could use the pre-plea probation report for sentencing. The court then sentenced appellant to a term of 20 years to life on count 1, a consecutive term of 55 years to life on count 2, and a consecutive term of one year eight months on count 4.

Appellant contends the trial court's silence on the reasons it imposed consecutive terms meant it did not understand it had discretion to do so. The court's mere silence alone does not demonstrate it misunderstood its discretion. The court is presumed to be aware of and follow the law, including when exercising its discretion at sentencing. (*People v. Mosley* (1997) 53 Cal.App.4th 489, 496-497.) And the applicable law did not require consecutive sentences. Count 2 (as well as count 3, which was stayed) fell within the One Strike law because it was committed during the commission of a burglary (§ 667.61, subds. (a), (c)(5), (7), (d)(4)), so the trial court was required to "impose a consecutive sentence for each offense that results in a conviction under this section if the crimes involve separate victims or involve the same victim on separate occasions as defined in subdivision (d) of Section 667.6." (§ 667.61, subd. (i).) But, as appellant recognizes, assault with the intent to commit sex crimes during the commission of a burglary under section 220, subdivision (b) is not listed in the One Strike law. (§ 667.61, subd. (c).) Thus, section 667.61, subdivision (i) did not apply and the trial court retained discretion to impose consecutive sentences on counts 1 and 2. Appellant has pointed to nothing in the record to suggest the trial court did not understand that, even though it did not expressly say so.

Likewise, counts 1, 2 and 4 fell within the Three Strikes law, which provides, "if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more serious and/or violent prior felony convictions as defined in subdivision (d), the court shall adhere to each of the following: [¶] . . . [¶] (6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the

defendant consecutively on each count pursuant to subdivision (e)." (§ 667, subd. (c)(6).) But "if two current felonies either *were* committed on the same occasion or *do* arise from the same set of operative facts, the three strikes law does not mandate consecutive sentencing; the trial court retains discretion to sentence either concurrently or consecutively." (*People v. Danowski* (1999) 74 Cal.App.4th 815, 821.) Although the court did not make express findings on this issue, the trial court could have implicitly concluded the assault with intent to commit a sex crime during the commission of a burglary in count 1, the oral copulation in count 2, and the false imprisonment in count 4 were committed on the same occasion and arose from the same operative facts, so the court retained discretion to impose consecutive sentences. Again, the trial court's silence does not mean it misunderstood the law. We find no error.[4]

3. Correction of Abstract of Judgment

At the sentencing hearing, the trial court granted appellant 554 days of custody credit and 81 days of conduct credit, for a total of 635 days of presentence credit, although the court appears to have added those numbers incorrectly for a total of 626 days. Both the sentencing minute order and the abstract of judgment adopted this error and erroneously reduced appellant's custody credit to 545 days. The abstract of judgment must be corrected to reflect 635 days of presentence credit, consisting of 554 days of custody credit and 81 days of conduct credit. The $300 sex offender fine in abstract of judgment must also be corrected to reflect a $200 sex offender fine, which was orally imposed by the trial court. And the court imposed a five-year enhancement pursuant to section 667, subdivision (a) on each of counts 1, 2, and 3, but stayed the sentence on

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[4] Without citation to authority or cogent analysis, appellant also contends the trial court erred by staying his sentences on count 3 (sexual penetration) and count 5 (burglary), rather than exercising its discretion to run them concurrently. His argument on count 5 is moot because we have reversed that conviction. The trial court properly stayed his sentence on count 3 because it arose from the same course of conduct pursuant to the same objective as counts 1 and 2. (*Rodriguez, supra*, 47 Cal.4th at p. 507.)

count 3. The abstract of judgment incorrectly reflects a total of 15 years for those enhancements and must be corrected to reflect a total of 10 years.

DISPOSITION

Appellant's conviction for burglary in count 5 is reversed. The abstract of judgment is modified to reflect 635 days of presentence credits (consisting of 554 days of custody credit and 81 days of conduct credit), a $200 sex offender fine, and a total of 10 years for the section 667, subdivision (a) enhancements. The trial court is directed to forward a corrected abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed as modified.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.