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THE STATE OF IN THE COURT OF APPEAL OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. GABINO ANDRES ROMERO et al., Defendants and Appellants.	2d Crim. No. B268565 (Super. Ct. No. 1447092) (Santa Barbara County)

After a joint trial before separate juries, the jury found Juan Carlos Herrera-Romero guilty of conspiracy to commit forcible rape (count 1; Pen. Code, § 182, subd. (a)(1)[1]), forcible rape while acting in concert (count 2; § 264.1), forcible rape (count 3; § 261, subd. (a)(2)), and forcible oral copulation while acting in concert (count 4; § 288a, subd. (d)). The jury also found that he personally used a knife in the commission of counts 2, 3 and 4. (§ 12022.3, subd. (a).)

[1] All statutory references are to the Penal Code.

A separate jury found Gabino Andres Romero guilty of counts 2, 3, 4 and making criminal threats (count 7; § 422). The jury also found that Romero personally used a knife in the commission of counts 2 and 7.

The trial court sentenced Herrera-Romero to an aggregate term of 45 years to life on counts 2, 3 and 4, and a concurrent term of nine years as to count 1.

The trial court sentenced Romero to 15 years to life on count 1, and an aggregate consecutive 21 years on counts 3, 4 and 7.

We amend the judgment to stay Herrera-Romero's concurrent sentence on count 1 pursuant to section 654. In all other respects, we affirm.

FACTS

On July 16, 2014, K.R., age 62, was homeless. She was living on the beach in Santa Barbara with her boyfriend, Barry Johns, age 69. At about 2:00 a.m., two men came into their camp. The men spoke Spanish and English.

Romero, the shorter of the two men, pushed Johns down on his stomach and held him to the ground. When Johns began to scream, Romero brandished a folding knife and pushed Johns's face into the sand. Romero threatened to cut Johns if he did not pretend to sleep.

Herrera-Romero took off K.R.'s clothes and began to rape her. Johns could see Herrera-Romero on top of K.R. "pumping away" with his pelvis against her pelvis. K.R. was saying, "No, stop it. It hurts."

When Herrera-Romero was finished, Romero began to rape K.R. Johns could see Romero "pumping away" with his

pelvis touching her pelvis. Romero took only a couple of minutes. The two men then walked away together.

It took Johns a few minutes to get up. By then K.R. had already left their camp.

At about 3:45 a.m., K.R. walked into the lobby of a nearby hotel. She was naked. She told the desk clerk she had been raped. The desk clerk gave her a bed sheet to wrap herself in and called the police.

When the police arrived, K.R. told them she had been raped by two Mexican men. One man was taller and older. The other was shorter and younger. They wore condoms. She said her vagina hurt during the rapes and still hurt at the time of the interview. The two men also forced K.R. to orally copulate them. Her right cheek and jaw had some swelling. K.R. told the police the men left in a light brown SUV.

K.R. said she was concerned about Johns. She thought the men might have broken his arm. She insisted that the police go to the camp to check on Johns.

K.R. led the police to the encampment on the beach just west of the hotel. Johns was there. The clothes K.R. had been wearing were scattered around the camp. The police found a white cell phone in the sand near K.R.'s clothing. The cell phone did not belong to K.R. or Johns.

The police obtained a search warrant for the cell phone. They traced it to Herrera-Romero. On the afternoon of July 16, 2014, Detective Brian Larson went to Herrera-Romero's job site. Herrera-Romero's gold SUV was there. In the back, there was a small locking blade knife.

Herrera-Romero did not appear surprised to see law enforcement at the job site. When Larson told Herrera-Romero

that he had a search warrant to collect DNA from his genitalia, Herrera-Romero asked to use the bathroom. When Larson said he had to accompany him, Herrera-Romero changed his mind about using the bathroom.

Herrera-Romero's Statement

Detective Andrew Hill interviewed Herrera-Romero at the police station. Herrera-Romero agreed to waive his rights and talk to Hill.

Herrera-Romero said he and Romero discussed raping a woman. They found K.R. on the beach. He admitted he raped her and forced her to orally copulate him. He wore a condom during the sex acts. He stayed with Johns while Romero was with K.R. and told Johns not to move. Herrera-Romero said he was sorry and wanted the victim to know it.

Romero's Statement

The police arrested Romero in the evening of July 16, 2014. They found a folding knife inside his car. Romero told the officers, "I know I did wrong. What happened last night was bad, but don't send me to Mexico or deport me to Mexico."

Detective Hill interviewed Romero at the police station. After being advised of his rights, Romero agreed to talk because he did something wrong. He said he and Herrera-Romero were drunk and fishing at the pier at about 2:00 a.m. They talked about having sex with some homeless girls. They went to the beach and decided to rape K.R. He gave Herrera-Romero a condom and kept one for himself. Romero grabbed Johns and told him not to scream while Herrera-Romero had sex with K.R.

Romero said he tried to have sex with K.R. But when she said it hurt, he felt bad and decided he did not want to

do it. He denied he had an erection or penetrated her vagina. He said he rubbed his penis against her vagina, but did not penetrate her. He also denied he forced her to orally copulate him or that he sodomized her.

Romero said he felt bad about what happened. He wrote a letter of apology to K.R.

Forensic Evidence

Swabs from K.R.'s breast collected DNA that matched Romero's DNA profile. There was no male DNA taken from K.R.'s vaginal swabs. That is consistent with the use of condoms.

DISCUSSION

I

Romero contends the trial court erred in failing to instruct prospective jurors not to conduct independent research about the case.

The trial court impaneled two juries to try the case. The parties agreed that Romero's jury would be impaneled first. On August 10 and 11, 2015, the court inquired of three groups of prospective jurors about hardship. The court admonished the first two groups not to think about or talk to anyone about the case. But it did not expressly admonish the groups not to conduct independent research about the case. The court admonished the third group not to read or research anything about the case. All remaining prospective jurors from the three groups were instructed to return to court on August 13.

When jury selection continued on August 13, the trial court asked the prospective jurors whether anyone had heard about the case.

One prospective juror said, "[Y]ou didn't say we couldn't look it up and I looked it up." Another prospective juror said she Googled it.

When the trial court said it told the prospective jurors not to do research, the prospective juror said, "I didn't hear that." The court replied, "Yes I did. I told you. Don't use the Internet. Don't do the research, do extra work, you're not going to get a good grade. You're supposed to be a juror and fair and impartial. The evidence is going to come from the witnesses that testify and exhibits. You're not to do research. We had a case years ago where some jurors went to the library across the hallway and looked up something about the case. That's not your job. Okay. Everybody hear that."

The trial court asked who else had heard about the case. After another juror said she saw a newsclip online, the court said, "Of course, I didn't make it clear. I failed." Thereafter, four other prospective jurors said they heard about or researched the case. The court questioned each of the responding jurors individually in chambers. None of the seven prospective jurors became trial jurors.

Section 1122, subdivision (a) requires the trial court to admonish the jury not to do research or read or listen to news accounts of the case. But, by its terms, it only applies "[a]fter the jury has been sworn and before the people's opening address . . . ." (*Ibid.*) Although giving such an admonition during the voir dire process constitutes "'sound judicial practice,'" the failure to do so does not constitute error. (*People v. Weaver* (2001) 26 Cal.4th 876, 909.)

Romero argues the trial court's comments amounted to scolding prospective jurors. He claims the scolding induced

prospective jurors to minimize or deny whether they had conducted outside research. He also claims that interviewing the prospective jurors individually in chambers added to the intimidation.

But there is nothing in the record to show the trial court intimidated jurors into minimizing or denying that they conducted research. First, shortly after the court made the comment Romero characterizes as "scolding," the court said, "Of course, I didn't make it clear. I failed." Second, all but one of the prospective jurors who admitted to having conducted research made the admission after the court's comment. The prospective jurors were not intimidated by the court's comment. Nor does Romero point to anything in the record to show that being interviewed individually in chambers resulted in intimidation.

Romero's reliance on *People v. Mello* (2002) 97 Cal.App.4th 511 and *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642 is misplaced. In those cases, the trial court instructed the potential jurors that if they harbor racial bias and are afraid to admit it during voir dire, they should lie or answer questions in such a way as to be excused on other grounds. Here, the trial court gave no such instruction to the potential jurors.

II

Romero contends the trial court erred in failing to instruct with CALCRIM No. 121 that the jury must accept the English translation of his recorded statements to the police. Herrera-Romero joins in the contention.

It is misconduct for a juror to translate evidence that is in a foreign language. (*People v. Cabrera* (1991) 230

Cal.App.3d 300, 304.) Romero points to no such misconduct here. Nevertheless, Romero argues the trial court erred in not instructing with CALCRIM No. 121. CALCRIM No. 121 instructs the jury that it must rely on the English language translation; if a juror believes the translation is wrong, he or she must write a note to the clerk or bailiff.

Romero cites no authority for the proposition that the trial court has the sua sponte duty to give CALCRIM No. 121. Nor does Romero cite any authority to support his argument that the failure rises to the level of constitutional error or structural error. This is unlike *Neder v. United States* (1999) 527 U.S. 1, 8, where the jury instructions omitted an element of the charged offense.

If there was error, Romero has the burden of showing there is a reasonable probability he would have obtained a more favorable result in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) He has not met that burden. Romero points to nothing in the record to show that any juror was bilingual. Nor does he show that a bilingual juror would have translated the matter any differently than the official translation or that the official translation was in any way inaccurate. Any error is harmless.

III

Romero contends there is no substantial evidence of penetration, an element of rape.

In reviewing the sufficiency of the evidence, we view the evidence in a light most favorable to the judgment. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We discard evidence that does not support the judgment as having been rejected by the trier of fact for lack of sufficient verity. (*People v. Ryan* (1999)

76 Cal.App.4th 1304, 1316.) We have no power on appeal to reweigh the evidence or judge the credibility of witnesses. (*People v. Stewart* (2000) 77 Cal.App.4th 785, 790.) We must affirm if we determine that any rational trier of fact could find the elements of the crime beyond a reasonable doubt. (*Johnson*, at p. 578.)

Here, K.R. told the police she was raped by two men. Johns testified that he saw Romero on top of K.R. "pumping away" pelvis to pelvis. That alone would be sufficient to support the conviction.

In addition, Romero admitted that he rubbed his penis against K.R.'s vagina. "The penetration which is required is sexual penetration and not vaginal penetration. Penetration of the external genital organs is sufficient to constitute sexual penetration and to complete the crime of rape even if the rapist does not thereafter succeed in penetrating into the vagina." (*People v. Karsai* (1982) 131 Cal.App.3d 224, 232, disapproved on other grounds in *People v. Jones* (1988) 46 Cal.3d 585, 600, fn. 8.) If Romero rubbed his penis against K.R.'s vagina, he must have penetrated her external genital organs.

IV

Herrera-Romero contends that his nine-year concurrent sentence imposed on count 1, conspiracy, must be stayed pursuant to section 654. The People concede. The objective of the conspiracy was the substantive offenses realized in counts 2 and 3. Thus, the conspiracy and the substantive offenses arose from the same set of facts, and section 654 prohibits punishments for both. (*People v. Lewis* (2008) 43 Cal.4th 415, 539, disapproved on other grounds in *People v. Black* (2014) 58 Cal.4th 912, 919.)

The judgment is amended to stay Herrera-Romero's sentence on count 1. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Rick S. Brown, Judge

Superior Court County of Santa Barbara

Tanya Dellaca, under appointment by the Court of Appeal, for Defendant and Appellant Gabino Andres Romero.

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