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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ANGEL MORENO CORDERO,

Defendant and Appellant.

B279161

(Los Angeles County  
Super. Ct. No. KA111110)

APPEAL from a judgment of the Superior Court of Los Angeles, Mike Camacho, Judge. Judgment of conviction is affirmed and the matter is remanded for resentencing.

Vanessa Place, 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, Steven E. Mercer, and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Angel Moreno Cordero was convicted of sexual penetration by a foreign object (digital penetration) (Pen. Code, § 289, subd. (a)(1)(A) (count 1)),<sup>1</sup> sexual battery by restraint (§ 243.4, subd. (a) (count 2)) and assault with intent to commit rape (§ 220, subd. (a)(1) (count 3)). The court sentenced Cordero to an aggregate state prison term of seven years four months: the middle term of six years on count 1, digital penetration, and a consecutive term of one year four months (one-third the middle term of four years) on count 3, assault with intent to commit rape. The court imposed and stayed pursuant to section 654 a middle term of three years on count 2, sexual battery by restraint. On appeal Cordero argues the sentence for assault with intent to commit rape should also have been stayed pursuant to section 654. We agree and remand the matter for resentencing, but otherwise affirm the judgment of conviction.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *1. Cordero's Attack*

The evidence at trial established that Cordero attacked Mayra Doe late in the evening of October 3, 2015 at the home of Mayra's brother and sister-in-law. Mayra had worked all day helping with the arrangements for a backyard party to celebrate her mother's 49th birthday. Around 11:00 p.m. Mayra, who had had several shots of tequila during the party and was tired, went upstairs to the master bedroom to take a nap. She closed the door, left the lights off, lay face down on a comforter on the floor (her two children were going to sleep in the bed later that night), and fell asleep.

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<sup>1</sup> Statutory references are to this code.

Cordero, a friend of Mayra's aunt who was catering the party, entered the bedroom, shut the door and straddled Mayra's back. Mayra attempted to get up and push him off. Cordero forced her back down and caressed her legs and body. Mayra told him to get off, but Cordero did not respond. Cordero pulled up her dress, slid his hands under her Spanx (sometimes referred to as a girdle at trial) and digitally penetrated her labia. As she continued to try to free herself, she heard the sound of a zipper. Mayra became more aggressive at that point, testifying she feared her assailant was going to rape her.

Cordero's cell phone rang several times in succession during the attack. He finally answered it and said, "Ahorita voy," which Mayra testified means, "I'll be right there." Mayra, who had not seen the attacker before the call, thought she recognized Cordero's voice when he spoke on his cell phone. She then identified him from a quick view of his side as he ran out the bedroom door.

When Cordero was gone, Mayra went downstairs, crying and very upset. She and her husband left the party. (Her sister-in-law said she would watch their children.) Once Mayra and her husband were at home, she told him she had been sexually assaulted and believed Cordero was the attacker.

Eduardo Murillo, the husband of Mayra's aunt, testified he was looking for Cordero and had called Cordero's cell phone several times around 11:00 p.m. When Cordero finally answered, he said he would be right there. Murillo then saw Cordero a few minutes later; Cordero told him he had gone upstairs to use a bathroom.

Mayra's aunt and Murillo confronted Cordero in the days following the assault, and each testified Cordero admitted having touched Mayra.

Cordero did not testify or call any witnesses in his defense. His counsel suggested Mayra and Cordero had both been drinking at the party, they had danced together, she had perhaps been flirtatious, and the contact may have been consensual or Cordero was so intoxicated that he did not really know what he was doing.

## *2. The Timing of the Cell Phone Call*

In her direct testimony Mayra said she heard the sound of the zipper before the missed cell phone calls. On cross-examination Mayra repeated, albeit with less certainty, that the zipper sound occurred before the phone calls: "I believe it was—I don't remember too much, but I believe it was before the phone call." However, she acknowledged she had told Los Angeles County Sheriff's deputies shortly after the incident that Cordero slid his hand underneath her girdle and she heard the zipper after the phone call, not before. Mayra then said, "If that's what I said, then that's perhaps how it happened. I just—I don't remember right now."

Sheriff's Detective Jeffrey Burke, who interviewed Mayra a few days after the attack, testified she told him that, "after the phone call, he was first trying to pull her girdle down, but because it was so tight, he couldn't. So he went underneath the girdle, moved it to the side, rubbed his fingers on her vagina. And then that's when she heard—she was squirming around, trying to tell him to get off, but her face was in the pillow because he was holding her down so he—that's when she heard the zipper, what sounded like a zipper. She said she got really

panicked because she thought she was going to be raped with her family downstairs. She started squirming more, was able to kind of roll up on her side, that's when he got off, ran out the door."

In her closing argument the prosecutor told the jury Cordero had committed assault with intent to commit rape when he unzipped his pants while restraining Mayra. The prosecutor acknowledged Mayra "wasn't totally sure anymore if the zipping of the pants came before or after the call," but emphasized that Mayra had said her memory was better when she talked to the police. Relying on chronology in those reports, the prosecutor argued both the digital penetration and assault with intent to commit rape occurred after the phone call: "And after the phone call, she says that's when the defendant scoots the Spanx aside, begins to rub her vagina, digitally penetrates her, and then she hears the zipper unzip. This is important. This is what the assault is. It's at this point."

### *3. The Court's Sentencing Decision*

In a sentencing memorandum following the jury's verdict finding Cordero guilty on all three counts, defense counsel argued count 2, sexual battery by restraint, "merge[d]" into the other two counts pursuant to section 654. She urged the court to sentence Cordero to the low term on count 1 (digital penetration) with a consecutive sentence of one-third the middle term on count 3 (aggravated sexual assault). The People did not file a sentencing memorandum, but the prosecutor agreed during the sentencing hearing that count 2 "potentially could 654 under count 3."

The court, after hearing a victim impact statement given on behalf of Mayra by the prosecutor and listening to argument, asked "whether or not count 3 somehow also may merge into count 1." The court continued, "I know this was a single

encounter, and obviously the conduct displayed during that encounter could warrant separate violations of law, but in terms of 654 can there be an argument made that count 3 somehow would merge into count 1?”

The prosecutor argued for separate punishments for the two offenses, stating the evidence showed that the digital penetration and assault with intent to commit rape (based on the sound of Cordero’s pants unzipping) had been separated by the cell phone call, and thus were distinct crimes. Acknowledging that she did not remember the evidence or her closing argument very well, the prosecutor said she believed she had argued that separation to the jury. Defense counsel stated her memory was that “everything kind of happened after the phone call.”

The court concluded section 654 did not apply to count 3. “The phone call is again kind of a key point in time because not only did it interrupt the encounter, but also it gave the defendant time to reflect upon his initial assault upon Mayra. And despite that interruption he made an effort to complete the attack. And the question, at least in the court’s mind, is whether or not this was one continuous encounter despite the phone call interruption or could it result into two separate offenses being committed for purposes of sentencing. And I’m going to find that it does.”

## DISCUSSION

### 1. *Section 654 and Separate Punishments for Discrete Sexual Offenses*

Section 654 prohibits a court from punishing a defendant for the same “act or omission” more than once even if it is the basis for multiple convictions. (§ 654, subd. (a).)<sup>2</sup> Section 654 also applies when the defendant engages in multiple acts that are part of a single course of conduct. (*People v. Capistrano* (2014) 59 Cal.4th 830, 885-886; *People v. Pinon* (2016) 6 Cal.App.5th 956, 967.)

Generally, the divisibility of a course of conduct depends upon the intent and objective of the actor. (*People v. Capistrano, supra*, 59 Cal.4th at p. 885.) ““If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.”” (*Ibid.*, quoting *People v. Rodriguez* (2009) 47 Cal.4th 501, 507.) However, “if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.” (*People v. Pinon, supra*, 6 Cal.App.5th at p. 968; accord, *People v. Rodriguez* (2015) 235 Cal.App.4th 1000, 1007 [“it is well established that a

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<sup>2</sup> Section 654, subdivision (a), 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. . . .”

defendant may harbor ‘separate and simultaneous intents’ in committing two or more crimes, for purposes of section 654”].)

Notwithstanding this general rule, in certain types of cases where a defendant has repeatedly committed discrete acts with a single objective or intent—such as committing multiple sexual assaults or firing a gun multiple times from a car—the application of section 654’s ban on multiple punishments turns on whether the discrete acts were separated by periods of time during which reflection was possible. (See *People v. Harrison* (1989) 48 Cal.3d 321, 337-338 [separate and consecutive punishments proper in single victim, multiple count sexual assault case; defendant had a separate intent to obtain sexual gratification each time he committed a sexual penetration and had an opportunity to walk away from the victim rather than resume his sexually assaultive behavior between penetrations]; *People v. Perez* (1979) 23 Cal.3d 545, 552-553 [an intent and objective to obtain sexual gratification is too broad to determine the applicability of section 654; “[a] defendant who attempts to achieve sexual gratification by committing a number of base criminal acts on his victim is substantially more culpable than a defendant who commits only one such act”]; see also *People v. Hicks* (1993) 6 Cal.4th 784, 788, fn. 4; *People v. Trotter* (1992) 7 Cal.App.4th 363, 367-368.)

“[M]ultiple crimes are not one transaction where the defendant had a chance to reflect between offenses and each offense created a new risk of harm.’ [Citation.] Under section 654, a course of conduct divisible in time, though directed to one objective, may give rise to multiple convictions and multiple punishment ‘where the offenses are temporally separated in such a way as to afford the defendant opportunity to



reflect and renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken.” (*People v. Lopez* (2011) 198 Cal.App.4th 698, 717-718; accord, *People v. Felix* (2001) 92 Cal.App.4th 905, 915.)<sup>3</sup>

We review the trial court’s express or implied finding that section 654 does not apply for substantial evidence. (*People v. Brents* (2012) 53 Cal.4th 599, 618; *People v. Osband* (1996) 13 Cal.4th 622, 730; *People v. Rodriguez, supra*, 235 Cal.App.4th at p. 1005; see *People v. Covarrubias* (2016) 1 Cal.5th 838, 890 [substantial evidence is evidence that is “reasonable, credible, and of solid value”].)

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<sup>3</sup> As the Attorney General explains, section 667.6, subdivision (c), operates as an exception to section 654. It authorizes the court, in its discretion, to impose “a full, separate, and consecutive term” of imprisonment “for each violation of an offense specified in subdivision (e) if the crimes involve the same victim on the same occasion.” Both sexual penetration by a foreign object (§ 289, subd. (a)(1)(A)) and assault with intent to commit rape (§ 220, subd. (a)(1)) are specified in section 667.6, subdivision (e). However, the trial court must indicate it is electing to sentence the defendant under section 667.6, subdivision (c), rather than section 1170.1 and also must state reasons supporting its sentencing choice. (*People v. Belmontes* (1983) 34 Cal.3d 335, 346-348.) The court in this case did neither, expressly addressing the requirements of section 654, and not mentioning section 667.6, subdivision (c). Accordingly, the Attorney General’s suggestion that we may affirm Cordero’s sentence as an implied exercise of the discretion conferred by section 667.6, subdivision (c), is without merit.

2. *Substantial Evidence Does Not Support the Trial Court's Finding Cordero Had Time To Reflect Between the Digital Penetration and the Assault with Intent To Commit Rape*

There certainly was evidence, as the trial court found, that Murillo's calls to Cordero's cell phone interrupted the sexual assault, giving Cordero time to reflect before he concluded the attack. Although Mayra testified at trial that the cell phone rang after Cordero had touched her underneath her girdle and she had heard the sound of a zipper and suggested that he rushed out of the bedroom shortly after answering the call, she told Detective Burke that Cordero had continued to attack her, including unzipping, after he had answered the call. The court was entitled to rely on the more contemporaneous account, which Mayra confirmed was given when she had a far clearer memory of the sequence of events. (See *People v. White* (2014) 230 Cal.App.4th 305, 319, fn. 14 [testimony of a single witness constitutes substantial evidence "even if it is contradicted by other evidence, inconsistent or false as to other portions"]; *In re Frederick G.* (1979) 96 Cal.App.3d 353, 366 [same].)

However, in each version of Mayra's chronology the digital penetration and the assault with aggravated intent, evidenced by the sound of the zipper, occurred in rapid sequence, either both before or both after Cordero answered his cell phone and said to the caller, "Ahorita voy." Thus, while speaking on his cell phone may have provided Cordero time to reflect and decide whether to renew his attack, as the court found, there is no evidence, let alone substantial evidence, the two offenses for which he was sentenced were temporally separated by that pause or by any other interruption giving Cordero time to reflect between

committing the two offenses. (Cf. *People v. Pena* (1992) 7 Cal.App.4th 1294, 1316 [analyzing similar time-to-reflect requirement under § 667.6, subd. (d); defendant's change of positions between different sexual acts was insufficient by itself to provide him with a reasonable opportunity to reflect upon his actions, "especially where the change is accomplished within a matter of seconds"]; *People v. Corona* (1988) 206 Cal.App.3d 13, 18.)

The trial court's decision to sentence Cordero separately on counts 1 and 3 was likely influenced by defense counsel's initial position (as set forth in her sentencing memorandum) that section 654 applied to the conviction for sexual battery by restraint but not the conviction for assault with intent to commit rape, as well as the prosecutor's mistaken recollection, advanced during the sentencing hearing, that the evidence at trial indicated the call came between the digital penetration and the sound of Cordero unzipping his pants. Whatever the reason, the court's decision not to stay execution of the sentence imposed on count 3 pursuant to section 654 was error.

### **DISPOSITION**

Cordero's sentence is vacated, and the matter remanded for resentencing. On resentencing the court shall stay execution of the sentence imposed on count 3 (assault with intent to commit rape). In all other respects the judgment is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

MENETREZ, J.\*

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\* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.