Filed 3/28/12 P. v. Proctor CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CHARLES JUAN PROCTOR, Defendant and Appellant.	B227140 (Los Angeles County Super. Ct. No. NA078477)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary J. Ferrari, Judge. Affirmed in part, reversed in part, vacated in part, and remanded with directions.

Alexander Paul Green, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael R. Johnsen and Eric E. Reynolds, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Charles Juan Proctor appeals from the judgment entered following his convictions by jury on numerous counts.[1] The court found appellant suffered two prior felony convictions (§ 667, subd. (d)) and two prior serious felony convictions (§ 667, subd. (a)). The court sentenced appellant to prison for 433 years to life. We affirm the judgment in part, reverse it in part, vacate it in part, and remand the matter with directions.

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[1] In particular, Proctor appeals from the judgment entered following his jury convictions on five counts of second degree robbery (Pen. Code, § 211 (unless otherwise indicated, subsequent statutory references are to the Penal Code); counts 1, 6, 17, 20 & 22) with, as to counts 1, 6, 17, and 22, personal use of a deadly and dangerous weapon (former § 12022, subd. (b)(1)) and with, as to count 17, personal infliction of great bodily injury (former § 12022.7, subd. (a)); three counts of kidnapping to rob (§ 209, subd. (b)(1); counts 2, 9 & 16) with personal use of a deadly and dangerous weapon (former § 12022, subd. (b)(1)) and with, as to count 16, personal infliction of great bodily injury (former § 12022.7, subd. (a)); and three counts of burglary (§ 459; counts 3, 14 & 21) with a finding as to count 14 the burglary was of the first degree, and with, as to counts 3 and 14, personal use of a deadly and dangerous weapon (former § 12022, subd. (b)(1)).

He also appeals following his jury convictions on three counts of false imprisonment by violence (§ 236; counts 11 & 19, plus one count as a lesser offense of kidnapping to rob (count 7)) with, as to count 11 and said lesser offense, personal use of a deadly and dangerous weapon (former § 12022, subd. (b)(1)) and with, as to count 11, personal infliction of great bodily injury (former § 12022.7, subd. (a)); assault (§ 240; as a lesser offense of assault with intent to rape (count 8)); count 10 – attempted first degree robbery (§§ 664, 211) with personal use of a deadly and dangerous weapon (former § 12022, subd. (b)(1)) and personal infliction of great bodily injury (former § 12022.7, subd. (a)); and two counts of attempted murder (§§ 664, 187; counts 12 & 15) with a finding as to count 15 the crime was willful, deliberate, and premeditated, and with, as to both counts, personal use of a deadly and dangerous weapon (former § 12022, subd. (b)(1)) and personal infliction of great bodily injury (former § 12022.7, subd. (a)).

He further appeals his jury convictions on count 13 – assault with a deadly weapon (former § 245, subd. (a)(1)) with personal infliction of great bodily injury (former § 12022.7, subd. (a)); two counts of mayhem (§ 203; counts 18 & 24) with personal use of a deadly and dangerous weapon (former § 12022, subd. (b)(1)); and count 23 – attempted kidnapping to rob (§§ 664, 209, subd. (b)(1)) with personal use of a deadly and dangerous weapon (former § 12022, subd. (b)(1)).

FACTUAL SUMMARY

1. *Counts 1 Through 3 (Victim Chinlean Khensovan).*

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 (*Ochoa*)), the evidence established the following. At 9:00 a.m. on February 18, 2008, Chinlean Khensovan was working alone in her beauty salon in Long Beach. Appellant entered and asked for a haircut. After Khensovan gave appellant a haircut, he said he lacked money but would return in 15 minutes to pay.

About 1:00 p.m., appellant returned and entered the salon. Appellant pulled out a knife, grabbed Khensovan by the throat, put the knife to her throat, and told her not to move. He then forcibly moved her to a closet. The distance she moved was slightly less than nine feet. After the two were in the closet, appellant stole from Khensovan $50 which had been in her back pocket. The store had a front window but a person could not see into the closet from the sidewalk.

After Khensovan gave appellant the money, he demanded she get on the floor and she complied. Khensovan then fought with appellant, causing him to drop the knife, and she tried to kick it away. Khensovan bit his finger and began screaming for help. Appellant retrieved the knife and fled.

2. *Count 6; Lesser Offenses of Counts 7 and 8; and Count 9 (Victim Kathleen Gibson).*

About 6:40 p.m. on April 26, 2008, Kathleen Gibson was in her women's clothing store in Long Beach. Appellant entered, kidnapped her to rob her, then robbed her. He also falsely imprisoned her by violence, and assaulted her.

3. *Counts 10 Through 14, and Count 24 (Victim Jennifer Wrenn).*

About 11:30 a.m. on April 27, 2008, Jennifer Wrenn was inside her Long Beach residence. Appellant entered and attempted to rob her. She screamed, tried to flee, and fell. Appellant sat on Wrenn's chest and put a knife to her throat. She began screaming. Appellant plunged the knife into her throat and pulled down on the knife. Wrenn testified appellant stabbed her in the throat twice. Wrenn continued to scream and appellant, using

the knife, slashed her face a couple of times and slashed the back of her head. Appellant then fled. Wrenn bled profusely and soon lost consciousness.

4. *Counts 15 Through 18 (Victim Saida Uriarte).*

About 1:00 p.m. on April 28, 2008, Saida Uriarte was working alone in her bridal shop in Long Beach. Appellant entered and said he wanted to see a bridal dress. Uriarte gave appellant bridal magazines which he reviewed. Appellant left after other people arrived.

Less than five minutes later, appellant returned and said he had forgotten to ask something. Uriarte asked him to wait and she entered a back room. Appellant entered the back room and, from behind her, held a sharp object on her right cheek near her ear, pushed her towards a cash register, and stole from her about $700.

After Uriarte gave appellant the money, he pushed her towards a closet. He continued holding the sharp object to her face, putting pressure on the object so it cut her. Appellant pushed her into the closet, told her to kneel, and she complied. He told her to remove her shoes and she complied. Appellant continued holding the sharp object to her face. Uriarte put her hand to her throat to protect it. She was afraid appellant would kill her. Appellant pushed her hand away from her throat, then used the sharp object to slash her throat twice and cut her once in or near her ear. Appellant then left. Uriarte bled profusely. Her throat wound required 19 staples and the wound near her ear required stitches. She had an approximate six-inch scar across her throat.

5. *Counts 19, 20, and 21 (Victims Ana Ruelas and Mercy Cuts).*

About 5:30 p.m. on April 29, 2008, Ana Ruelas was working in Mercy Cuts salon near Hawaiian Gardens. Appellant entered, burglarizing the salon, and later robbed her and falsely imprisoned her by violence.

6. *Counts 22 and 23 (Victim Betty Valles).*

About 2:45 p.m. on May 2, 2008, Betty Valles was working in a Long Beach salon. Appellant entered, attempted to kidnap her to rob her, and robbed her of about $35.

Appellant presented no defense testimony as to any of the counts in this case.

ISSUES

Appellant claims (1) there is insufficient evidence of kidnapping to rob (count 2), (2) there is insufficient evidence of premeditation and deliberation as to his conviction on count 15 for attempted murder, (3) his Nevada conviction for attempted kidnapping with deadly weapon use was not a strike because the present offenses occurred after said attempted kidnapping but before said conviction, (4) there was insufficient evidence his Nevada conviction for attempted sexual assault was a strike, or a prior serious felony conviction for purposes of section 667, subdivision (a), (5) section 654 barred punishment on counts 3, 14, and 21, and on his conviction for a violation of section 236 as a lesser offense of count 7, (6) the court erroneously imposed an upper term on count 12, and (7) his sentence constituted cruel and unusual punishment.

DISCUSSION

1. *There Was Sufficient Evidence of Kidnapping to Rob (Count 2).*

Appellant claims there is insufficient evidence of kidnapping to rob (count 2). "Kidnapping to commit [robbery] involves two prongs. First, the defendant must move the victim and this asportation must not be 'merely incidental to the [robbery].' [Citations.] Second, the movement must increase 'the risk of harm to the victim over and above that necessarily present in the [robbery].' [Citation.] The two are not mutually exclusive, they are interrelated. (*People v. Rayford* (1994) 9 Cal.4th 1, 12 . . . [(*Rayford*)].)" (*People v. Shadden* (2001) 93 Cal.App.4th 164, 168 (*Shadden*).)[2] Appellant disputes the sufficiency of the evidence as to the two prongs. We reject his claim.

There is no dispute appellant kidnapped and robbed Khensovan. Moreover, there was substantial evidence as follows. Appellant pulled out a knife, grabbed Khensovan by the throat, put a knife to her throat, and forced her to walk almost nine feet to the closet. He then forced her inside the closet and stole money from her at knifepoint.

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[2] We have replaced the word "rape" found in the above quote from *Shadden* with the word "robbery" since section 209, subdivision (b)(1) proscribes kidnapping to rob as well as kidnapping to rape, and the same analysis applies to both crimes.

Appellant could have robbed Khensovan outside the closet without forcibly moving her at all. Appellant did not move Khensovan to the location of the money; she had it on her all the time. Appellant took the money from Khensovan only after he moved her into the closet. We note there is no minimum number of feet a defendant must move the victim in order to satisfy the first prong. (*Shadden*, *supra*, 93 Cal.App.4th at p. 168.) Moreover, where movement changes the victim's environment (as the movement did here) it does not have to be great in distance to be substantial. (*Id*. at p. 169) The forced movement of Khensovan was not incidental to the robbery.

As to the second prong, during the period appellant forcibly moved Khensovan to the closet and later into it, she was continually exposed to the risk of being stabbed and/or cut; therefore, there was possible enhancement of danger to her resulting from the movement.

By forcing Khensovan into the closet with appellant, he increased the requisite risk of harm to Khensovan in several ways. Appellant decreased the likelihood of detection. A person on the sidewalk could not see into the closet. Appellant had an enhanced opportunity to commit crimes. Appellant exposed Khensovan to danger inherent in foreseeable attempts to escape (attempts which in fact materialized). Appellant decreased the possibility she would escape or be rescued. The forced movement of Khensovan towards and into the closet substantially increased the risk of harm to her beyond that inherent in robbery. We conclude there was sufficient evidence appellant kidnapped Khensovan to rob her. (Cf. *Rayford*, *supra*, 9 Cal.4th at pp. 12-14; *People v. James* (2007) 148 Cal.App.4th 446, 452-458; *People v. Corcoran* (2006) 143 Cal.App.4th 272, 278-280; *Shadden*, *supra*, 93 Cal.App.4th at pp. 167-170.)

2. *There Was Sufficient Evidence of Premeditation and Deliberation as to Appellant's Conviction on Count 15 for Attempted Murder*.

Appellant does not dispute he attempted to murder Uriarte (count 15) but claims there is insufficient evidence of premeditation and deliberation as to that offense. Relying on familiar principles,[3] we reject the claim.

There was substantial evidence as follows. Appellant put a sharp object to Uriarte's face and later stole money from her. He subsequently pushed her towards a closet, continuing to hold the sharp object to her face and putting pressure on it so the object hurt her. Appellant pushed her into the closet and told her to kneel, and she complied.

Uriarte put her hand to her throat, signaling she did not want to die by having her throat slit. She posed no threat to appellant. Nonetheless, appellant pushed her hand from her throat, then used the sharp object to slash her throat twice and cut her once near her ear. The manner of the attempted murder provided evidence of premeditation and deliberation because he repeatedly slashed Uriarte's throat. The primary wounds suffered by Uriarte were not the result of aimless swinging of the sharp object but resulted from particular and exacting slashes centered on the throat, increasing their probable lethality.

The utter lack of provocation by Uriarte is strong evidence appellant's attack was deliberately and reflectively conceived in advance. Appellant failed to secure medical

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[3] "Deliberate" means arrived at as a result of careful thought and weighing of considerations for and against the proposed course of action, and "premeditated" means considered beforehand. (*People v. Perez* (1992) 2 Cal.4th 1117, 1123.) Deliberation and premeditation can occur in a brief period of time. The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. (*People v. Thomas* (1945) 25 Cal.2d 880, 900.) Premeditation and deliberation require merely an opportunity for reflection. (*People v. Cook* (2006) 39 Cal.4th 566, 603.) The presence of premeditation or the absence thereof is to be determined from a consideration of the type of weapon employed and the manner of its use, the nature of the wounds suffered by the deceased, and the fact the attack was unprovoked and the victim was unarmed at the time of the assault. (*People v. Clark* (1967) 252 Cal.App.2d 524, 529-530.) We also consider any evidence of planning activity, prior relationship, and the manner of the killing. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1019.)

attention for Uriarte, and left with the weapon. Uriarte's throat wounds were severe, as evidenced by the fact it took 19 staples to close them and she had an approximate six-inch scar across her throat. The jury was also entitled to consider the facts pertaining to appellant's attempt to murder Wrenn one day before the present offense. We conclude there was sufficient evidence appellant's attempted murder of Uriarte was willful, deliberate, and premeditated. (Cf. *People v. Raley* (1992) 2 Cal.4th 870, 887-888; *People v. Garcia* (2000) 78 Cal.App.4th 1422, 1427-1428; *People v. Lunafelix* (1985) 168 Cal.App.3d 97, 100-103; *People v. Clark*, *supra*, 252 Cal.App.2d at pp. 528-530.)

3. *Appellant's Nevada Conviction for Attempted Kidnapping with Deadly Weapon Use Was a Strike*.

In August 2007, appellant committed in Nevada the crime of attempted kidnapping with deadly weapon use (hereafter, attempted kidnapping). As previously indicated, appellant committed the present California offenses on specific dates during the period February 2008 through May 2008. In July 2008, appellant pled guilty in Nevada to the attempted kidnapping. In the present case, the trial court found true an allegation appellant suffered a strike based on said Nevada conviction, and the court relied upon that strike when imposing sentence in the present case pursuant to the Three Strikes law.

Appellant claims his 2008 Nevada conviction for attempted kidnapping was not a strike because the present offenses occurred after said attempted kidnapping but before said conviction. He is essentially arguing the attempted kidnapping conviction was not a "prior conviction of a felony" within the meaning of sections 667, subdivision (d) and 1170.12, subdivision (b), i.e., the Three Strikes law. We reject his claim.

In *People v. Williams* (1996) 49 Cal.App.4th 1632 (*Williams*), the defendant committed current felony offenses after he suffered a prior conviction, but before he was sentenced on the prior conviction. (*Id*. at p. 1637.) On appeal, the defendant argued the prior conviction was not a strike for the sole reason he was sentenced thereon after he had committed the current offenses. (*Ibid*.) *Williams* disagreed.

Williams stated, "The purpose of [Penal Code] section 667 (b)-(i) is to deter and punish *recidivism by making repeat offenders* serve longer sentences. [Citation.] The focus of the three strikes law is *conduct*: did the defendant commit a felony after having previously committed one or more serious or violent felonies? When a defendant pleads guilty to or is convicted of a felony, the law is satisfied factually that he or she committed it. When the deterrent effect of the law fails and the defendant subsequently commits another felony, he or she becomes a repeat offender and deserves harsher punishment, regardless of whether judgment and sentence have been pronounced on the initial offense." (*Williams, supra*, 49 Cal.App.4th at p. 1638.)

The above quote is equally true in this case; we add only that the repeat offender deserves harsher punishment, regardless of whether the repeat offender's guilt for the initial offense is adjudicated only after the commission of the subsequent offense. Appellant broke the law when he committed the attempted kidnapping. He later broke the law when he committed the present offenses. That made him a recidivist. That fact is not altered by the fact he arguably might have been a more culpable recidivist if, after he committed the attempted kidnapping, but before he committed the present offenses, he pled guilty to the attempted kidnapping and then knew he had been adjudicated guilty of that offense. Indeed, appellant's argument would permit gamesmanship since, if appellant were correct, a defendant could cause an otherwise qualifying strike to be not qualifying simply by delaying adjudication of the putative strike until after the commission of a current felony offense(s).

4. *There Was Insufficient Evidence Appellant's Nevada Conviction for Attempted Sexual Assault Was a Strike or a Prior Serious Felony Conviction.*

a. *Pertinent Facts.*

The first amended information alleged, inter alia, that on September 12, 1988, appellant suffered a Nevada conviction in case No. C85177 for attempted sexual assault, and that said conviction was a strike, and a prior serious felony conviction for purposes of section 667, subdivision (a). Viewed in accordance with the usual rules on appeal (*Ochoa, supra*, 6 Cal.4th at p. 1206), the evidence presented at appellant's bifurcated court trial on

his prior conviction allegations (hereafter, priors trial) established that in 1988 in case No. C85177, appellant pled guilty in Nevada to attempted sexual assault in violation of Nevada Revised Statutes (NRS) sections 193.330, 200.364, and 200.366. No evidence was presented at the priors trial as to the specific facts of the attempted sexual assault or how appellant committed it. There is no dispute it occurred in 1988.

During the priors trial, the prosecutor asserted "any attempted sexual assault . . . would be a felony would [*sic*] comport with our . . . statute that would apply to 667.(b) [*sic*] through (i)." Later, the prosecutor asked the court to find the above Nevada offense was a violent felony and therefore a strike. Still later, the prosecutor asked the court to find the "crime is sufficient to meet the sexual assault, violent felony that we have here under 261.2(a) [*sic*], rape." Appellant argued the Nevada conviction was not a strike.

At the conclusion of the priors trial, the trial court stated, "I've reviewed both of these sections from Nevada NRS 200.264 [*sic*], NRS 200.366, NRS 193.330 and find that to be in conformity and comport with the California laws relating to sexual offenses[.]" The court found the Nevada conviction was a strike, and a prior serious felony conviction for purposes of section 667, subdivision (a). The trial court relied on the Nevada conviction to impose sentencing pursuant to the Three Strikes law and to impose a five-year section 667, subdivision (a) enhancement.

b. *Analysis*.

Appellant concedes he suffered the Nevada conviction, but claims there is insufficient evidence the Nevada conviction was a strike, or a prior serious felony conviction for purposes of section 667, subdivision (a). We agree. The Three Strikes law provides, in pertinent part, for increased punishment for any person convicted of a felony who previously has been convicted of a serious felony or a violent felony. (§§ 667, subd. (d)(1), 667.5, subd. (c), former 1192.7, subd. (c).) Section 667, subdivision (a) similarly provides for a five-year enhancement when the defendant has suffered a prior serious felony conviction. Since we deal here with a Nevada conviction, we determine whether the Nevada predicate offense, if committed here, would have satisfied the elements of a serious

or violent felony. (§ 667, subds. (a), (d)(2).) The applicable Nevada law is the Nevada law applicable at the time of appellant's Nevada offense. (Cf. *People v. O'Bryan* (1985) 37 Cal.3d 841, 844; *People v. Dillingham* (1986) 186 Cal.App.3d 688, 699.)

In the context of both the Three Strikes law and section 667, subdivision (a), if, as here, the record of conviction does not disclose the facts concerning how the offense was committed, we presume the conviction was for the least serious form of the offense, and we view the record as establishing only the least adjudicated elements of the offense. (Cf. *People v. Miles* (2008) 43 Cal.4th 1074, 1083; *People v. Delgado* (2008) 43 Cal.4th 1059, 1066 (*Delgado*); *People v. Rodriguez* (1998) 17 Cal.4th 253, 261-262 (*Rodriguez*); *People v. Cortez* (1999) 73 Cal.App.4th 276, 280 (*Cortez*).)

Moreover, if the Nevada statute under which the Nevada conviction occurred could be violated in a way that does not qualify as a strike, there is insufficient evidence the Nevada conviction was a strike. Similarly, if the Nevada statute under which the Nevada conviction occurred could be violated in a way that does not qualify as a serious felony, there is insufficient evidence appellant suffered a prior serious felony for purposes of section 667, subdivision (a). (Cf. *Delgado*, *supra*, 43 Cal.4th at p. 1066; *Rodriguez*, *supra*, 17 Cal.4th at pp. 261-262; *Cortez*, *supra*, 73 Cal.App.4th at p. 280.)

Appellant suffered his Nevada conviction pursuant to NRS sections 193.330, defining attempt;[4] 200.366, defining the crime of "sexual assault;"[5] and 200.364, defining

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[4] NRS section 193.330, pertaining to punishment for attempts, states, "An act done with intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit that crime[.]"

[5] NRS section 200.366, which, inter alia, defines the term "sexual assault," states, in relevant part, "1. A person who subjects another person to sexual penetration, or who forces another person to make a sexual penetration on himself or another, or on a beast, against the victim's will or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct, is guilty of sexual assault." Fairly read, the statutory elements of the crime are: (1) a person subjects another person to sexual penetration, *or* a person forces another person to make sexual penetration on himself, on another, *or* on a beast and (2) this conduct either is against the victim's will *or* occurs under conditions in which the perpetrator knows *or*

the term "sexual penetration"[6] for purposes of said crime of sexual assault. The definition of the Nevada crime of "sexual assault" is phrased in disjunctive, as are the requirements of the term "sexual penetration." Accordingly, there are multiple ways a Nevada attempted sexual assault can be committed.

Section 667.5, subdivision (c) lists violent felonies, many of which are crimes the definitions of which are phrased in the disjunctive; therefore, there are multiple ways those California crimes as violent felonies may be committed. Similarly, former section 1192.7, subdivision (c) lists serious felonies, many of which are crimes the definitions of which are phrased in the disjunctive; therefore, there are multiple ways those California crimes as serious felonies may be committed.

If appellant's Nevada attempted sexual assault could have been committed in one or more ways without committing a California crime which is a violent or serious felony in any of the ways a violent or serious felony could be committed, appellant's sufficiency claim is meritorious. For the reasons discussed below, we conclude it is.

Part of the problem in this case is neither the prosecutor nor the trial court clearly identified what California violent or serious felony the Nevada attempted sexual assault allegedly constituted. During the priors trial, the prosecutor appeared to argue, inter alia, the Nevada offense was a rape in violation of section "261.2(a)" (*sic*), a "violent felony." There is no section 261.2.

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should know that the victim is mentally *or* physically incapable of resisting *or* understanding the nature of his conduct.

6 NRS section 200.364, which, inter alia, defines the term "sexual penetration," states, in relevant part: "As used in . . . NRS 200.366 . . . , unless the context otherwise requires: [¶] . . . [¶] 2. 'Sexual penetration' means cunnilingus, fellatio, or any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another, including sexual intercourse in its ordinary meaning." Fairly understood, and unless context otherwise requires, the term "sexual penetration" means (1) cunnilingus, (2) fellatio, (3) any intrusion, however slight, of any part of a person's body into the genital or anal openings of the body of another, including sexual intercourse in its ordinary meaning, *or* (4) any object manipulated or inserted by a person into the genital or anal openings of the body of another.

Even assuming the prosecutor was arguing the Nevada offense was, under California law, an *attempted* rape and therefore a *violent* felony under section 667.5, subdivision (c), the argument was misplaced. Although subdivision (c) includes certain rapes (subds. (c)(3) & (18)), subdivision (c) does not provide an *attempt* to commit those rapes is a violent felony.

Assuming the prosecutor was arguing the Nevada offense was, under California law, a *completed rape* and therefore a *violent* felony under section 667.5, subdivision (c)(3) or (18),[7] the argument was again misplaced. For example, a person could commit a Nevada *attempted* sexual assault by committing a proscribed *attempt* to perform "cunnilingus" or "fellatio," or by committing a proscribed attempt to intrude a finger "into the genital or anal openings of the body of another" within the meaning of NRS section 200.364, subdivision 2, without (1) committing the violent felony of rape by engaging in the requisite *completed* "act of sexual intercourse" within the meaning of section 261, subdivision (a) or section 262, subdivision (a), or (2) committing rape, or spousal rape, in concert in violation of section 264.1.

Former section 1192.7, subdivision (c) provides *attempted* rape is a *serious* felony (former § 1192.7, subds. (c)(3), (39)). However, even assuming the prosecutor was arguing the Nevada offense was, under California law, an attempted rape and thus a serious felony, the argument was inapposite for the following reasons. First, a person could commit a Nevada attempted sexual assault by committing a proscribed attempt to perform "cunnilingus" or "fellatio," or by committing a proscribed attempt to intrude a finger "into the genital or anal openings of the body of another," within the meaning of NRS section 200.364, subdivision 2, without committing the California serious felony of attempted rape

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[7] Section 667.5, subdivision (c)(3), lists the following as a violent felony: "Rape as defined in paragraph (2) or (6) of subdivision (a) of Section 261 or paragraph (1) or (4) of subdivision (a) of Section 262." Section 667.5, subdivision (c)(18) lists, in relevant part, the following as a violent felony: "Rape, [or] spousal rape, . . . in concert, in violation of Section 264.1."

by attempting to engage in the requisite "act of sexual intercourse" within the meaning of section 261, subdivision (a) or section 262, subdivision (a).

Second, fairly understood by itself and in context, NRS section 200.366, subdivision 1, which proscribes sexual assault accomplished by "sexual penetration . . . *on* a beast" (italics added) requires sexual penetration *into* a beast. As appellant suggested to the trial court during argument, a person could commit a Nevada attempted sexual assault by attempting to force another person to make a proscribed sexual penetration "on a beast" within the meaning of NRS section 200.366, subdivision 1, without (1) committing the California serious felony of attempted rape by attempting to engage in the requisite "act of sexual intercourse accomplished *with a person* not the spouse of the perpetrator" (italics added) within the meaning of section 261, subdivision (a), or (2) committing the serious felony of attempted rape by attempting to rape a *spouse* by "an act of sexual intercourse" within the meaning of section 262, subdivision (a).

Third, as appellant also suggested below, a defendant could commit a Nevada attempted sexual assault by attempting to subject another person to a proscribed sexual penetration "under conditions in which the perpetrator . . . *should know* that the victim is mentally . . . incapable of . . . understanding the nature of his conduct" (italics added) within the meaning of NRS section 200.366, subdivision 1, without committing the California serious felony of attempted rape under section 261, subdivision (a)(4)(B). This is true because section 261, subdivision (a)(4)(B) does not apply unless the defendant *knows* the victim was unconscious in the sense the victim was unaware the act occurred.

As to this last point, respondent cites former section 289 and various jury instructions for the proposition "a defendant must have an actual and *reasonable* belief that an *unconscious* victim *consented* to the sexual act." (Italics added.) However, respondent cites no case authority in support of his proposition, the jury instructions respondent cites do not support it, respondent conflates a defendant's reasonable belief concerning a victim's consent with a defendant's knowledge of a victim's unconsciousness, and respondent has

failed to explain how a defendant could reasonably believe an unconscious person could consent to anything.

Assuming the prosecutor was arguing the Nevada offense was, under California law, a *completed rape* and therefore a *serious* felony under former section 1192.7, subdivision (c)(3), the argument again missed the mark. The reasoning of our earlier discussion rejecting any argument the Nevada offense was, under California law, a completed rape and therefore a violent felony under section 667.5, subdivision (c)(3) or (18), is largely applicable here and compels rejection of any argument the Nevada offense was a completed rape and serious felony.

Respondent, for the first time on appeal, suggests the Nevada attempted sexual assault constituted the serious felony of an attempted (former § 1192.7, subd. (c)(39)) "violation of subdivision (a) of Section 289[8] where the act is accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person[.]" (Former § 1192.7, subd. (c)(25)). We disagree for the reasons below.

First, a person could commit a Nevada attempted sexual assault by committing proscribed "fellatio" within the meaning of NRS section 200.364, subdivision 2, without attempting to commit a California serious felony under former section 1192.7, subdivisions (c)(25) and (39), since fellatio may be committed without (1) the requisite attempt to penetrate "the genital openings . . . of another person" within the meaning of former section

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8 Former section 289, subdivision (a)(1), states, in relevant part, "Any person who commits an act of sexual penetration 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." Subdivision (k), states, in relevant part, "As used in this section: [¶] (1) 'Sexual penetration' is the act of causing 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 device, or by any unknown object."

289, subdivision (a), or (2) the requisite attempt to accomplish the act "by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person" within the meaning of former section 1192.7, subdivision (c)(25).

Second, a person could commit a Nevada attempted sexual assault by committing a proscribed attempted "intrusion, however slight, of any part of a person's body . . . into the genital or anal openings of the body of another" within the meaning of NRS section 200.364, without attempting to commit a former section 1192.7, subdivision (c)(25) serious felony, since a person can commit the above quoted conduct without attempting the requisite penetration "by any foreign object, substance, instrument, or device" within the meaning of former section 289, subdivisions (a) and (k)(1).

Third, a person could commit a Nevada attempted sexual assault by committing proscribed attempted "sexual intercourse" within the meaning of NRS section 200.364, subdivision 2, without (1) attempting the requisite penetration "by any foreign object, substance, instrument, or device" within the meaning of former section 289, subdivisions (a) and (k)(1), or (2) the requisite "force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person" within the meaning of former section 1192.7, subdivision (c)(25).

Fourth, a person could commit a Nevada attempted sexual assault by committing a proscribed attempt to force another person to make a "sexual penetration . . . on a beast" (i.e., into a beast) within the meaning of NRS section 200.366, subdivision 1, without attempting the requisite penetration of the "genital or anal openings" of the "defendant" or a "person" within the meaning of former section 289, subdivisions (a)(1) and (k)(1).[9]

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[9] Respondent argues "under California law, a beast could be considered a "foreign object" under former section 289. If a defendant causes a victim to commit an act of sexual penetration on a beast in California, he could be charged with a felony pursuant to former section 289. Therefore, the Nevada sexual assault statute contains all of the elements of California's statute regarding forcible acts of sexual penetration, a serious felony. (§§ 289, 1192.7, subd. (c)(3).)" We note former section 1192.7, subdivision (c)(3) lists the serious felony of rape. Respondent's argument is without merit. Fairly understood by itself and in its statutory context, NRS section 200.366, subdivision 1, which proscribes sexual assault

We hold there is insufficient evidence appellant's Nevada conviction in case No. C85177 for attempted sexual assault was a strike, or a prior serious felony for purposes of section 667, subdivision (a). We will reverse the true findings as to the allegations said Nevada conviction was a strike, and a prior serious felony conviction for purposes of section 667, subdivision (a), and we will remand the matter for a retrial on those two allegations. (*Cortez*, *supra*, 73 Cal.App.4th at pp. 278, 286-287.)

5. *There Is No Need to Reach Appellant's Fifth, Sixth, and Seventh Claims.*

Appellant's remaining claims are (1) Penal Code section 654 barred punishment on his convictions on counts 3, 14, and 21, and on his conviction for a violation of section 236 as a lesser offense of count 7, (2) the court erroneously imposed an upper term on count 12, and (3) his total sentence constituted cruel and unusual punishment. There is no need to discuss these claims since we are remanding as previously indicated and the court will have to resentence appellant. We express no opinion concerning what that sentence should be.

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accomplished by "sexual penetration . . . *on* a beast" (italics added) requires sexual penetration *into* a beast. Whether or not a beast could be a "foreign object" under former section 289, subdivision (a), and therefore used as a *means to effect* a penetration, that subdivision requires penetration of "another person." It follows a Nevada attempted sexual assault committed by attempted "sexual penetration . . . on a beast" within the meaning of NRS section 200.366, subdivision 1, does not involve attempted penetration of the "defendant" or a "person" within the meaning of former section 289, subdivisions (a) and (k)(1). Nor does a Nevada attempted sexual assault committed by attempted "sexual penetration . . . on a beast" involve attempted rape of a person (§§ 21a, 261, 262).

To the extent respondent suggests the Nevada attempted sexual assault constituted the serious felony of an attempted violation of former section 289, subdivision (b), involving penetration of a victim by a person who knows or should know the victim is incapable of giving consent, we reject the suggestion. Neither a violation of former section 289, subdivision (b), nor an attempted violation of subdivision (b), is listed as a serious or violent felony.

DISPOSITION

The judgment is affirmed, except the true findings as to the allegations appellant suffered, for purposes of the Three Strikes law and Penal Code section 667, subdivision (a), a 1988 Nevada conviction in case No. C85177 for attempted sexual assault are reversed, his sentence is vacated, and the matter is remanded for a new trial as to those two allegations, a new sentencing hearing, and for further proceedings not inconsistent with this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.