Filed 8/2/17 P v. Lopezquinonez CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. GILBERTO R. LOPEZQUINONEZ, Defendant and Appellant.	B276775 (Los Angeles County Super. Ct. No. YA090806)

APPEAL from a judgment of the Superior Court of Los Angeles County, Hector M. Guzman, Judge. Affirmed and remanded with directions.

David M. Thompson, 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, Assistant Attorney General, Susan Sullivan Pithey and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

After trial, a jury convicted appellant Gilberto Lopezquinonez of seven counts of sexual penetration by a foreign object in violation of Penal Code section 289, subdivision (a) (counts 1 through 7),[1] two counts of attempted second degree robbery in violation of sections 664 and 211 (counts 8 and 9), and misdemeanor grand theft in violation of section 487, subdivision (c) (count 10). With respect to the seven counts of sexual penetration, the jury returned a true finding, pursuant to section 667.61, subdivision (b) and (e), that appellant committed the crimes against multiple victims. The various charges were based upon four incidents involving multiple victims.

The trial court sentenced appellant to two consecutive indeterminate terms of 15 years to life in prison for the sexual penetration convictions in counts 1 and 7 and the multiple victim enhancement. The court added an aggregate consecutive determinate term of three years, eight months for the two attempted robbery convictions in counts 8 and 9. The court sentenced appellant to a concurrent term of one year in the county jail for the misdemeanor grand theft conviction in count 10. Finally, with respect to the five sexual penetration convictions in counts 2 through 6, all of which involved the same victim as in count 1, the court found that Penal Code section 654 applied, and sentenced appellant to five concurrent indeterminate terms of 15 years to life in prison.

In this appeal, appellant contends that (1) the trial court improperly admitted evidence of an uncharged crime pursuant to Evidence Code section 1101, subdivision (b), (2) the trial court

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[1] All further undesignated section references are to the Penal Code unless otherwise noted.

erred when it failed sua sponte to instruct on lesser included offenses, (3) trial counsel was ineffective when he failed to request instructions on lesser included offenses, (4) the trial court erred when it failed to state the statutory basis for penalty assessments attached to the mandatory sexual offender fine, and (5) the trial court improperly calculated his pre-custody good conduct credits. In its brief, respondent notes that the sentences imposed on counts 2 through 6 appear to be illegal.

Although we affirm the judgment and ultimately determine the trial court did not impose an illegal sentence, we remand so that the abstract of judgment can be corrected to reflect what the trial court intended.

FACTS

1. Attempted Robbery of Nikki A. (Count 9)

On April 5, 2014, at about 1:40 a.m., Nikki A. left Hennessey's restaurant in Redondo Beach. As Nikki A. walked to her neighbor's apartment, appellant approached her and began to talk to her. He commented about her Louis Vuitton purse, then suddenly grabbed it and began to pull it off of her shoulder. In response, Nikki A. pulled back on the purse. Appellant then fled down the street. Appellant's attempt to take her purse caused bruising to Nikki A.'s forearm that lasted for two weeks.

When Nikki A. arrived at the apartment, she told her friend, Sydney G., what had happened and described appellant. Sydney G. told Nikki A. about an "uncomfortable" incident involving a similar individual, whom she identified at trial as appellant, that had happened to her a few moments earlier. As Sydney G. left Hennessey's and walked home, appellant approached her and began talking to her. When Sydney G. walked down the stairs to her apartment, appellant grabbed the

back of her dress and lifted it up. She pushed appellant's hand away, screamed, and ran into her apartment. After hearing Nikki A.'s story, Sydney G. called 911.

2. Grand Theft of Deanna F. (Count 10)

In the very early morning of April 12, 2014, Deanna F. walked to her parked car from Hennessey's restaurant in Redondo Beach. She heard footsteps running towards her from behind and then saw appellant run past her. Surprised, Deanna F. exclaimed, "Wow, you scared me." Appellant stopped, turned around, stepped towards Deanna F., and then began to walk alongside her. Deanna F. stepped out into the street to get away from appellant, but he kept walking beside her. Appellant reached over to touch Deanna F.'s purse and she screamed at him to "get the fuck away from me." Appellant ran away.

Deanna F. continued to her car. She unlocked her car, got inside, and tried to calm down. Suddenly, she looked over and saw appellant on the passenger side of her car. He quickly opened the passenger door, grabbed her purse, and ran away. Deanna F.'s identification, credit cards, and cell phone were in her purse. Deanna F. chased appellant down the street but returned to her car after she fell down. An UBER driver who was picking up a passenger called 911 for Deanna F.

3. Uncharged Crime (Evid. Code, § 1101, subd. (b)) -- Jenifer D.[2]

Just after midnight on the morning of April 13, 2014, Jenifer D. walked from Hennessey's restaurant to her parents'

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[2] When she called the victim of this incident to the stand, the prosecutor identified her as "Jenifer P." The reporter, however, after the victim took the stand, stated and spelled her name, identified her as "Jenifer D."

house. Shortly before she arrived at her parents' house, she noticed appellant about a block away, following her. Jenifer D. turned around and told appellant to stop following her. She continued to walk to her parents' house, and appellant continued to follow her. She then turned, ran the rest of the way to her parents' house, entered the front gate, closed it, and ran to the front door.

As she fumbled with her keys at the front door, Jenifer D. turned and saw appellant standing at the front gate. He appeared to be masturbating. Jenifer D. began banging on the door and calling for her parents, who eventually came to the door and let her in the house. As she entered the house she turned and saw that appellant had fled. Later that evening, Jenifer D. went back outside and saw a white, chalky substance that appeared to be semen near where appellant had been standing. Jenifer D.'s mother called 911, and both she and her mother spoke to the police.

Torrance Police Officer Ryan Schmitz arrived at about 12:30 a.m. and spoke to Jenifer D. Schmitz broadcasted a description of appellant to other police units, who searched both the immediate area and adjoining Redondo Beach, but they were unable to locate appellant. Schmitz then requested forensic identification specialist Gabrielle Wilmer to respond to the scene. Schmitz watched Wilmer collect samples of a white substance that appeared to be semen near the front gate of the location. Wilmer booked the samples into evidence.

On October 31, 2014, Torrance Police officer Jesus Garcia conducted a recorded interview of appellant about the incident. Appellant initially denied involvement. Eventually he admitted that he was seated outside his work at the H.T. Grill when he

noticed Jenifer D. walking by with friends. He said hello to her but she did not respond. When she separated from her friends and began to walk home alone, he followed her. He wanted to know where she lived so one day he would have the "the courage" to tell her how he felt about her. When she got home and went to her front door, he stayed at the gate, put his hand in his pants, and massaged his penis until he ejaculated into his hand. He then removed his hand from inside his pants and shook the semen off onto the ground.

John Bockrath, a forensic analyst with Los Angeles County Sheriff's Department Scientific Services Bureau, analyzed the samples obtained by Wilmer, determined them to be semen, and further determined that the DNA obtained from them matched appellant's DNA profile.

4. Sexual Penetration and Attempted Robbery of Stephanie K. (Counts 7 and 8)

On the evening of June 7, 2014 , Stephanie K. worked as a waitress at the Redondo Beach Brewing Company. After her shift ended at 10:30 p.m., she had a beer at the bar. At about 11:30 p.m., she walked to the nearby H.T. Grill with some friends and had a glass of wine. After she finished her wine, she left the grill and walked to her car alone.

Stephanie K. passed by appellant, who was standing alone. As Stephanie K. approached her car, appellant came from behind her, wrapped his arms around her arms and torso, and pulled her to the ground. She initially landed on her side, but then rolled onto her back. Appellant was on top of her. Appellant unsuccessfully tried to pull off her shorts, and then slid his hand up her left leg and penetrated her vagina with his finger.

Stephanie K. struggled against appellant, pushing and squirming, and also tried to kick him. Finally, she got one arm free and elbowed appellant in the face. Appellant got up off of her. Appellant then grabbed the handle of Stephanie K.'s purse, which was looped around her forearm. The two tugged back and forth on the purse. Stephanie K. pulled the purse free from appellant and he ran away.

Stephanie K. got into her car. She was hysterical, and did not know what to do so she called her friend Paige. She stayed on the phone with Paige, and drove to Paige's house in El Segundo. She and Paige talked about what had happened. Stephanie then took a shower and spent the night at Paige's house. She did not call the police that night because she was "scared," "tired," and "just wanted to forget about it."

The next morning Stephanie K. called the police and reported the attack. She decided not to submit to a sexual assault exam because she did not think appellant would be caught and because she did not want to miss work and force her co-workers to cover for her.

5. Multiple Sexual Penetrations of Justine B. (Counts 1 through 6)

On July 26, 2014, Justine B. spent the evening with friends at a bar called Mickie Finnz in Redondo Beach. After consuming six drinks over a three-hour period, Justine B. left the bar with a a male member of the group, Rhett Muskin. The two stopped at a liquor store, bought a bottle of vodka, and then walked down to the beach.

When they got to the sand, Justine B. needed to urinate. Muskin left her at the waterline to give her some privacy, and walked away behind a lifeguard tower. Justine B. stood at the

water line facing the ocean, pulled down her pants and underwear, squatted, and urinated.

As Justine B. began to stand up and pull up her underwear and pants, appellant approached her from behind, put his arm around her waist, and inserted his fingers into her vagina. As Justine B. struggled against him, appellant moved to face her and then pushed her down onto her back and buttocks. When Justine B. screamed for Muskin, appellant placed his hand over her mouth and told her to "shut the fuck up." As he faced Justine B., appellant removed his fingers from her vagina and inserted them into her anus. He continued to use his other hand to cover her mouth. He then went back and forth, approximately three or four times, inserting his fingers into both her vagina and anus. Justine B. tried to fight appellant, by kicking and punching him. At one point she was able to remove a shoe and strike him in the head with that.

Muskin heard Justine B.'s screams and ran to help her. As Muskin approached, appellant got off of Justine B. and ran off down the beach. Justine B. pulled up her pants, pointed at appellant, and screamed "he raped me." Muskin chased appellant down the beach, tackled him, and dragged him back onto the strand. On the strand, appellant continued to struggle. He spun out of his shirt and ran down the strand. Muskin caught appellant again, slammed him onto the concrete strand, and dragged him up onto the esplanade. Muskin told a couple who were on the ramp to the esplanade to call the police. Muskin held appellant until the police arrived, which took about a minute.

Both Torrance and Redondo Beach Police officers arrived at the scene. Torrance Police Officer James Terrell initially took appellant into custody from Muskin. During a consensual search,

Terrell recovered two loose condoms from appellant's rear pocket. Terrell determined that the assault on Justine B. had occurred in Redondo Beach, so he turned over custody to the Redondo Beach Police officers and left the scene.

Redondo Beach Police Officer Kyle Lofstrom arrived at the scene and later drove Justine B. back to the police station. At the station, Lofstrom interviewed Justine B. about what had occurred. Later he drove her to a Torrance hospital for a sexual assault exam.

Forensic nurse examiner Jenna Fratarcangelo performed the sexual assault examination of Justine B. at the hospital. Fratarcangelo observed abrasions and redness to Justine B.'s right arm, bruising on her left knee and thigh, and an abrasion on her neck, all of which were consistent with Justine B.'s description of appellant's assault. Fratarcangelo also examined Justine B.'s vagina and anus. She observed a laceration to the "posterior fourchette" of Justine B.'s vagina, and two lacerations to her anal area. These injuries were "fresh," "red", and "open," and consistent with the assault described by Justine B.

6. Appellant's Employment

Appellant worked as a dishwasher at the H.T. Grill in Redondo Beach. According to the staff work schedule, appellant worked 4:00 p.m. to 10:00 p.m. on April 4 and April 11, 2014, 10:00 a.m. to 6:00 p.m. on April 12, 2014, 4:00 p.m. to 12:00 a.m. on June 6, 2014, and 12:00 p.m. to 9:00 p.m. on July 25, 2014. On April 13, 2014, appellant had a scheduled day off.

7. Appellant's Statements to the Police

On July 28, 2014, Redondo Beach Police Detective Luis Velez interviewed appellant while he was in custody at the Redondo Beach Police Department. Velez asked appellant about

the "Asian girl" (Stephanie K.). Appellant said he came out of H.T. Grill where he worked, and saw her sitting on a bench. She appeared to be intoxicated. He sat down on the bench and she began kissing him on his neck and chest. They then walked over to her parked vehicle, where she had her arms around him and continued to kiss him. At one point they fell to the ground, and appellant was on top of her. She continued to kiss him.
He noticed she was wearing loose shorts with "string" underwear. He inserted his index finger into her vagina, removed it, and then inserted his middle finger into her vagina and removed it.
He eventually got away from her by prying her arms off of him and walking away. She was not screaming.

Velez asked appellant about the second victim (Justine B.) Appellant denied any sexual contact with her, and said he only touched her rib cage to check on her well-being. He then volunteered that his DNA would not be found on her because he did not touch "her vagina or anal hole." Velez never mentioned that Justine B. had accused appellant of digitally penetrating both her vagina and anus.

8. The Defense

Appellant testified at trial.

On the evening he was arrested, he got off work and walked down to the beach. He saw a woman (Justine B.) lying on the sand near the water. He walked up to her to see if she was "okay." She did not respond to his questions, so he got down on his knees and touched her arm. She got up very quickly and began hitting appellant in the face. He started to walk away, and noticed a man chasing after him. The man used "bad words," "profanity," and appellant wondered "why are they saying this to

me." The man caught up to him, slammed him down several times, and held him until the police arrived.

Appellant never saw the Asian girl, Stephanie K., before the trial. He told Detective Velez he did not remember her, but Velez kept telling him he had to say he did. He never gave Velez the description of the incident that Velez claimed in his testimony. With the exception of Justine B., appellant had never seen any of the women who testified against him prior to trial.

On cross-examination, appellant admitted that he did follow Jenifer D. home from his workplace. He admitted that he put his hand in his pocket and touched his penis through his pocket, but did not masturbate. He could not explain the presence of his semen outside Jenifer D.'s gate. On redirect, he admitted that he told the investigating officer what happened during the incident with Jenifer D., and that he pleaded guilty to the crime charged against him from that incident.

DISCUSSION

I. Evidence of Uncharged Bad Act (Jenifer D.)

The trial court admitted evidence of the incident involving Jenifer D. pursuant to Evidence Code section 1101, subdivision (b). The court determined that appellant's conduct during that uncharged incident was relevant to prove "intent, identity, motive, [and] plan." The court also determined that the potential for prejudicial effect or undue consumption of time did not substantially outweigh the probative value of the evidence.

The trial court instructed the jury on the use of this evidence in a manner largely consistent with its oral ruling. The court instructed the jury that it could not use the evidence to show criminal propensity but could use it to show that appellant (1) was the perpetrator of the charged crimes, (2) acted with the

intent of sexual arousal or gratification, (3) had a motive to commit the charged crimes, (4) did not act due to mistake or accident, and (5) had a common plan or scheme to commit the charged crimes.

Appellant contends that the trial court erred in this decision and that the error was prejudicial. We find no error, and even if we were to assume error, we find it to be harmless.

Evidence Code section 1101, subdivision (a), prohibits the use of uncharged criminal or other bad acts to show criminal propensity. Subdivision (b) of that section however, allows evidence of such acts when relevant to prove any other disputed fact, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, [or] absence of mistake or accident." The admissibility of other crimes evidence depends upon its similarity to the charged crimes, and the degree of similarity required depends upon the purpose for which it is admitted. (*People v. Jones* (2011) 51 Cal.4th 346, 371.)

The least degree of similarity is required to establish intent. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402 (*Ewoldt*); accord *People v. Kelly* (2007) 42 Cal.4th 763, 783 (*Kelly*).) This is because the recurrence of a same or similar result tends, increasingly with each event, to eliminate the possibility of accident, inadvertence, or other innocent mental state. (*Ewoldt, supra,* at p. 402.) The uncharged and charged offenses must be sufficiently similar so as to support an inference that the defendant """probably harbored the same intent in each instance. [Citations.]""" (*Ibid.*) This level of similarity, logically, also applies to absence of mistake or accident, which is identical to intent, and motive, which is also related to mental state.

A greater degree of similarity is required to prove a common plan or scheme. (*Ewoldt, supra,* 7 Cal.4th at p. 402; accord *Kelly, supra,* 42 Cal.4th at p. 784.) The uncharged and charged offenses must share not only a similarity of results, but sufficient common features such that the various acts are naturally explicable as caused by a general plan of which they are but individual manifestations. (*Ewoldt, supra,* at p. 402.)

The greatest degree of similarity is required to prove identity. (*Ewoldt, supra,* 7 Cal.4th at p. 403; accord *Kelly, supra,* 42 Cal.4th at p. 784.) To establish identity, the uncharged and charged offenses must share common features sufficiently distinctive so as to support an inference that the same person committed them. (*Ewoldt,* at p. 403.) "'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.' [Citation.]" (*Ibid.*)

Before admitting evidence pursuant to Evidence Code section 1101, subdivision (b), the trial court must balance the probative value and prejudicial effect pursuant to Evidence Code section 352. (*Kelly, supra,* 42 Cal.4th at p. 783.) The trial court's decision to admit such evidence is reviewed for abuse of discretion. (*People v. Jones, supra,* 51 Cal.4th at p. 371; *Kelly, supra,* at p. 783.)

The trial court did not abuse its discretion. The record below shows sufficient similarity between the charged offenses and the uncharged Jenifer D. incident so as to make it relevant for each of the purposes allowed by the trial court.

All of the incidents in this case, both charged and uncharged, involved female victims who were either alone, or who, moments before the incident, had left or separated from a person or persons with whom they had been. All of the incidents

either occurred, or began, in Redondo Beach, near the location where appellant worked. All occurred late at night, or early in the morning after midnight, around the time appellant finished his work shift. All involved victims who were leaving a restaurant or bar, which would allow appellant to infer they might be especially vulnerable due to alcohol consumption.

All involved a similar plan or manner of execution. Although only Jenifer D. expressly described appellant as having followed her, that description corroborated appellant's conduct as inferentially established by the described circumstances of the other offenses: circumstantially, appellant either followed the victims of the charged offenses or at least observed them for some period of time while waiting for an opportune moment to attack a vulnerable female victim.

Thus, appellant suddenly approached Nicki A. after she left Hennessey's and walked alongside of her, engaging her in conversation before grabbing her purse. This sequence of events strongly suggests that appellant was outside after his work shift waiting for a vulnerable victim to exit a nearby bar or restaurant so that he could approach and commit his crime. Moreover, although apparently not acted upon, a reasonable inference the jury could draw is that appellant also had sexual gratification, rather than merely theft on his mind at the time he attacked Nicki A. Moments before, nearby, he had grabbed at Sydney G. in what can only logically be described as an attempted sexual battery.

The Deanna F. incident was also strongly suggestive of a period of observation or following, waiting for an opportune moment to act. The incident occurred as Deanna F. left Hennessey's, again suggesting that appellant was outside, after

his work shift, waiting for a victim. Although Deanna F. did not see him following her, appellant did approach her from behind suddenly, and then walk alongside of her before his attack. Again this is similar to appellant's conduct with respect to Jenifer D.: identifying a vulnerable female victim exiting a bar, approaching, and waiting for the opportunity to act.

Appellant was already outside the H.T. Grill, when Stephanie K. left the restaurant. He attacked her from behind and pulled her to the ground. He took advantage of her position to digitally penetrate her, before attempting to complete his crime by trying to take her purse. Again, this is suggestive of lying in wait and waiting for the right moment to act, as well as of a dual intent or motivation in connection with his selected victims: not only theft, but also sexual gratification to the extent the situation permitted it.

Appellant attacked Justine B. after she and Muskin had left Mickie Finnz, gone to a liquor store, then wandered down to the beach. He attacked shortly after she separated from Muskin and walked down to the water, and when she was vulnerable because in the act of pulling up her pants and underwear. Such a timed attack inferentially suggests appellant had been following the pair for at least some time, and that the attack, like his others, was planned to coincide with the victim at her most vulnerable.

The incident with Jenifer D. clearly involved an intent to achieve sexual gratification, an element of the sexual penetration counts charged in connection with Stephanie K. and Justine B. The penetrations occurred during a struggle, with each victim actively resisting. The prosecution had the burden, then, of establishing that the penetrations were intentional and for the

purpose of sexual gratification, rather than accidental in the course of the struggle. The conduct with Jenifer D. was therefore relevant and, for the reasons already stated, sufficiently similar so as not to be unduly prejudicial.

Finally, we think the similarities described above -- similar locations, similar victims, similar times, similar intents, similar planning and execution of the attacks -- are sufficient even for purposes of establishing identity. In our opinion, they are numerous and distinctive enough to be considered "a signature."

Additionally, the trial court explicitly conducted a balancing of prejudicial effect and probative value pursuant to Evidence Code section 352, and found the conduct sufficiently probative to admit. In the course of doing so, the trial judge excluded another incident offered by the prosecution pursuant to Evidence Code section 1101, subdivision (b). It is clear the trial court was well aware of its obligation to balance probative value and potential prejudicial effect. It is equally clear that the court also acted within the limits of its sound discretion.

Lastly, were we to find error – which we emphatically do not – it would be harmless in any event. Error in the admission or exclusion of evidence warrants reversal of a judgment only when, after an examination of the entire cause, including the evidence, a reviewing court is of the opinion that the error produced a miscarriage of justice. (Cal. Const., art. VI, § 13; see also, *People v. Breverman* (1998) 19 Cal.4th 142, 173.) The now common standard for determining whether such a miscarriage has occurred, is, of course, whether it is reasonably probable that a result more favorable to the defendant would have occurred in the absence of the evidence. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Here, the record demonstrates no such miscarriage. The evidence against appellant was overwhelming. Each victim identified appellant at trial as her assailant. Nicki A., Stephanie K., and Deanna F. also identified appellant from a six-pack photo line-up, and Nicki A. and Stephanie K. further identified him at the preliminary hearing.[3] Appellant was literally caught in the act of sexually assaulting Justine B. Her physical injuries fully corroborated her description of the assault, as well as impeached appellant's attempt to describe it, both to the police after his arrest and at trial, as, essentially, a misunderstanding. Appellant's work place and work shift hours also corroborated his opportunity to commit the charged crimes.

Appellant's statements during his post-arrest interview, that Stephanie K. was the sexual aggressor, and that Justine B. attacked him due, apparently, to a misunderstanding of his intent, even on the cold page of a reporter's transcript, are, to put it charitably, fanciful. They are not believable and were clearly found to be so by the jury. His testimony at trial, to the extent it did not contradict his post-arrest statement, was equally unbelievable and therefore consistent with a finding of guilt.

In short, the prosecution presented a strong case with articulate, consistent, and believable victims. Appellant was literally caught in the middle of the assault on one victim. Appellant's explanations, both to the police and from the witness stand at trial, did not help him, and likely contributed to the verdict against him. The testimony of Jenifer D. regarding the uncharged incident at her gate, was harmless even if we were to -- and again we do not -- find it to be error.

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[3] Deanna F. did not testify at the preliminary hearing.

II. Failure to Instruct on Lesser Included Offenses

Appellant contends all six of his sexual penetration convictions associated with his attack on Justine B. must be reversed because the trial court did not instruct the jury sua sponte on the lesser included offenses of attempted sexual penetration (§§ 664/289, subd. (a)(1)(a)), assault with intent to commit sexual penetration (§ 220, subd. (a)(1)), simple assault (§ 240), sexual battery (§ 243.4, subd. (a)), and battery (§ 242). We disagree.

A trial court has a sua sponte duty to instruct on a lesser offense that is necessarily included in a charged offense when there is substantial evidence the defendant is guilty only of the lesser offense. (*People v. Shockley* (2013) 58 Cal.4th 400, 403-404; *People v. Breverman, supra,* 19 Cal.4th at p. 153.) The existence of "any evidence, no matter how weak" does not require jury instructions on a lesser included offense; such instructions are required only when evidence that the defendant is guilty of a lesser offense is ""substantial enough to merit consideration"" by the jury. (*People v. Hughes* (2002) 27 Cal.4th 287, 366.)

We review the trial court's failure to instruct on lesser included offenses de novo. (*People v. Woods* (2015) 241 Cal.App.4th 461, 475.) Under this standard, the reviewing court considers the evidence in the light most favorable to the defendant, and the question is not whether the evidence supports a conviction of a greater charged crime, but whether, given the evidence, independently assessed, the jury reasonably could have found the defendant guilty of the lesser crime. (*Ibid.*)

Here, we see no evidence that could have led the jury to reasonably find appellant guilty of any of the described lesser included offenses during the attack on Justine B. The evidence

showed that Justine B. was either squatting down on the sand (her testimony) or inertly lying on the sand (his testimony), and that appellant either forcibly inserted his fingers into her vagina and anus multiple times (her testimony, supported by the medical evidence of abrasions, lacerations and redness consistent with a sexual attack) or did nothing more than "touch" her arm (his testimony). We see no aspect of Justine B.'s trial testimony that would support a reasonable jury's finding that he only tried to sexually penetrate her, i.e., an attempt that came up short, or that he did no more than assault her with the intent to commit a sex crime, i.e., an assault without completing an intended sex crime, or that he did no more than commit a simple assault or battery. The events on the beach either transpired as Justine B. described them or as appellant described them. We do not have a situation where there was some memory lapse, or vagueness or uncertainty or inconsistency in a witness's testimony, or where, for some other reason, the testimony fell short of fully describing a greater charged offense, leaving open the reasonable possibility for the jury to find a lesser crime. Further, appellant's testimony did not reasonably support a jury's conviction for a lesser offense; it showed only innocence of any criminal activity.

III. Ineffective Assistance of Counsel

Appellant contends all six of his sexual penetration convictions involving his attack on Justine B. must be reversed because his trial counsel provided ineffective assistance of counsel in failing to request that the trial court instruct the jury on the lesser included offenses of assault with intent to commit sexual penetration, assault, attempted sexual penetration, sexual battery, and battery. We disagree.

To prevail on a direct appeal on a claim of ineffective assistance of trial counsel a defendant must establish two elements. First, he or she must show from the record that counsel's representation fell below an objective standard of reasonableness, and, second, he or she must show a reasonable probability that, but for counsel's errors or omissions, a determination more favorable to the defendant would have resulted. (See *Strickland v. Washington* (1984) 466 U.S. 668, 690, 694; and see, e.g., *People v. Holt* (1997) 15 Cal.4th 619, 703.)

In review on direct appeal, an appellate court will presume that trial counsel rendered adequate assistance and exercised reasonable professional judgment in making trial decisions. (See, e.g., *People v. Holt, supra*, 15 Cal.4th at p. 703.) Accordingly, the record on appeal must establish the lack of a rational tactical purpose for a challenged act or omission (*People v. Williams* (1997) 16 Cal.4th 153, 215), and, where the record is silent as to why trial counsel acted or failed to act in the manner challenged, the ineffective assistance of counsel claim must be rejected unless there could be no plausible explanation for his or her acts or failures. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

Here, we reject appellant's claim of ineffective assistance of trial counsel because the record supports a satisfactory explanation as to why his trial counsel did not request instructions on lesser included offenses. As we explained above, there was no substantial evidence supporting instructions on lesser included offenses. Thus, had a request been made, it would have been properly rejected. Counsel is not ineffective for failing to present futile requests to the trial court. (*People v. Price* (1991) 1 Cal.4th 324, 386-387.)

IV. The Questioned Penalty Assessment and Surcharge

Appellant contends, and the People agree, that the case should be remanded to the trial court so that it can specify the statutory basis for all penalty assessments and surcharges.

At appellant's sentencing hearing, the trial court stated that it was imposing a $300 sex offender fee pursuant to section 290.3. The next day, the court clerk prepared an abstract of judgment that included an attachment entitled "Other Orders." The attached document states that appellant is ordered to pay the $300 sex offender fee, "plus a penalty assessment and 20% criminal surcharge." No statutory basis is stated for the penalty assessment and surcharge, which the trial court, when it pronounced sentence, did not expressly impose.

"In Los Angeles County, trial courts frequently orally impose [certain prescribed] penalties and surcharge[s] . . . by a shorthand reference to 'penalty assessments.' The responsibility then falls to the trial court clerk to specify the penalties and surcharge in appropriate amounts in the minutes and, more importantly, the abstract of judgment." (*People v. Sharret* (2011) 191 Cal.App.4th 859, 864.) Division Five of our court has deemed this to be an "acceptable practice." (*Ibid.*) The Third District has taken a different view: "Although we recognize that a detailed recitation of all the fees, fines and penalties on the record may be tedious, California law does not authorize shortcuts." (*People v. High* (2004) 119 Cal.App.4th 1192, 1200.)

The Attorney General agrees with appellant's request for specificity with respect to the penalty assessment, surcharge, and section 290.3 sex offender fee. Since, as we discuss below, the case must be remanded to amend the abstract of judgment to reflect a legal sentence, we agree that remand is appropriate.

On remand, the trial court should identify the statutory basis and amounts for all penalty assessments and criminal surcharges ordered with the $300 sex offender fee.

V. Custody Credits

Appellant contends, and the People agree, that appellant is entitled to one additional day of presentence custody credit.

Defendants are entitled to presentence custody credits for all days served, measured by including the day of arrest and the day of sentencing. (*People v. Bravo* (1990) 219 Cal.App.3d 729, 735.) Further, a defendant such as appellant who is convicted of a violent felony as defined in section 667.5, subdivision (c), is entitled to conduct credit calculated at 15 percent of the actual time in custody. (§ 2933.1.) In making this 15 percent calculation, the resulting conduct credits are to be rounded down to the nearest whole number and not rounded up. (*People v. Ramos* (1996) 50 Cal.App.4th 810, 815-816.)

Appellant was arrested on July 26, 2014, and he was sentenced on August 8, 2016. Thus, counting the day of arrest and the day of sentencing, he spent 745 days in actual presentence custody. Multiplying 745 days by 15 percent equals 111.75, or 111 days of conduct credits. Thus, total presentence custody credits should be 856 (745 + 111), not the 855 awarded by the trial court.

VI. The Section 654 Issue

Consistent with the relevant portions of the one-strike sentencing statute for forcible sex crimes, section 667.61, subdivisions (b), (e)(4), and (i), the trial court sentenced appellant to consecutive indeterminate terms of 15 years to life for the initial sexual penetration of Justine B. (count 1) and the sexual penetration of the separate victim, Stephanie K. (count 7).

With respect to counts 2 through 6, the remaining sexual penetration convictions involving Justine B., the trial found that "under Penal Code [section] 654 . . . they are all part of a single occasion, not a separate occasion, and that 654 applies." The court then imposed a 15 year-to-life term as to each of those counts, with the terms to run concurrently. The abstract of judgment shows the sentences on those counts as being imposed concurrently, but stayed pursuant to section 654.

The law is clear that terms of imprisonment subject to section 654 are not run concurrently, but are imposed and execution stayed, with the stay to become permanent upon the defendant's completion of the balance of his sentence. (*People v. Duff* (2010) 50 Cal.4th 787, 795-796.) Ordinarily, ordering a sentence stayed pursuant to section 654 to run concurrent to any other sentence is an unauthorized sentence, and typically we would remand to the trial court to impose a lawful sentence. (See *People v. Alford* (2010) 180 Cal.App.4th 1463, 1473.)

In this case, however, a review of the record in the context provided by the prosecutor's sentencing memorandum and her sentencing argument, leads us to conclude that the trial court simply misspoke when it referenced section 654. First, the trial court never stated that execution of the sentence was "stayed" pursuant to section 654, which is typically the language employed. The court's clerk simply added that language to the abstract after the trial court's oral mention of section 654.

Second, the trial court's statement that the remaining counts involving Justine B. were part of a single, rather than separate occasion, is clearly a reference to section 667.6, subdivision (d), incorporated by reference in section 667.61, subdivision (i). The single occasion/separate occasion distinction

defines when a trial court must sentence consecutively on multiple offenses involving a single victim, and when it has the discretion to sentence concurrently. (See § 667.61, subd. (i); cf. *People v. Rodriguez* (2005) 130 Cal.App.4th 1257, 1262 [construing an earlier version of section 667.61 which did not expressly require consecutive sentences].) The prosecutor argued this very distinction and provided statutory authority in her sentencing memorandum. We believe, in context, that the trial court meant to refer to section 667.6, subdivision (d), not section 654, in its oral pronouncement of sentence, and that based upon its finding of a single occasion, it was simply exercising its discretion to impose concurrent rather than consecutive indeterminate terms on the remaining convictions involving Justine B. Accordingly, we remand so that the abstract of judgment may be corrected to reflect that the sentences on counts two through six are concurrent only, rather than stayed. Any reference to section 654 in connection with those counts must be stricken.

DISPOSITION

The judgment is affirmed. The matter is remanded to the trial court for clerical corrections of the abstract of judgment consistent with this opinion.

SORTINO, J.*

We concur:

BIGELOW, P.J. RUBIN, J.

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