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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. GERALD VIDAL, Defendant and Appellant.	B232020 (Los Angeles County Super. Ct. No. LA063927)

APPEAL from a judgment of the Superior Court of Los Angeles County. Barry A. Taylor, Judge. (Retired Judge of the L.A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed in part, affirmed in part, sentence vacated and remanded.

Victoria H. Stafford, 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 C. Keller and Russell A. Lehman, Deputy Attorneys General, for Plaintiff and Respondent.

FACTUAL AND PROCEDURAL BACKGROUND

On the morning of December 17, 2009, defendant was selling magazine subscriptions door to door and persuaded T.H. to purchase one. When he discovered she was alone in the house, he pushed T.H. into the house, closed the door behind him, and dragged her farther into the house. He pulled down her pants and underwear, pushed her to the floor, held her down by choking her with one hand, and ordered her to spread her legs. T.H. kicked defendant and grabbed his necklace and tried to choke him with it. When the necklace broke, defendant struck her under the eye. Then he licked her vagina.

When defendant stood to take off his pants, T.H. managed to run to the front door to try to escape, but he pulled her back, threw her to the floor, and inserted his thumb into her vagina. T.H. kicked a fireplace and a door and screamed in hopes that a neighbor would hear. Defendant hit her several times with his fist, kicked her and threatened to kill her. She tried to put her legs under a sofa but defendant pulled her away from it.

After defendant beat T.H. with his fist, she crawled under a table and tried to hold onto it, but defendant pulled her out by the legs, and the part she had grasped broke off. Defendant inserted his finger into her anus, then placed his penis against her anus for about 20 seconds.

As T.H. struggled and pleaded with him, defendant jabbed her in the ribs with a 6-to 8-inch stick. When she fought back, defendant stood and pulled up his pants and kicked her. T.H. crawled under a table, and defendant demanded money. T.H. told defendant there was money upstairs, and he pushed her to lead him to it. As she crawled up the stairs, defendant continued to push her.

Once up the stairs, T.H. tried to escape into a bedroom, but defendant followed, demanding to know where the money was. He saw a piggy bank, took the money from it, then pushed T.H. onto a bed and covered her with a bedspread while he searched for more. When she peeked out from underneath the blanket as defendant walked around the room, he told her to stay where she was and kicked her several times. He then left.

T.H. went to the hospital with numerous injuries. An anal swab retrieved defendant's DNA.

Police contacted the leader of a magazine crew working the neighborhood, who led them to defendant. Defendant matched the description given by T.H. and possessed the necklace and a sales receipt bearing T.H.'s name and address and the time of the sale. T.H. was taken to where defendant was detained and identified him as her attacker.

A medical examination revealed defendant had abrasions on his arms, shoulders, back, hip and knees.

Defendant was charged in count 1 with first degree burglary of an occupied residence (Pen. Code, §§ 459, 667.5, subd. (c)),[1] in counts 2 and 3 with sexual penetration with a foreign object (§ 289, subd. (a)(1)), in count 4 with attempted sodomy by force (§§ 664, 286, subd. (c)(2)), in count 5 with assault with a deadly weapon with great bodily injury (§§ 245, subd. (a)(1), 12022.7), in count 6 with kidnapping (§ 207, subd. (a)), in count 7 with assault to commit a felony during the commission of a first degree burglary (§ 220, subd. (b)), and in count 9 (count 8 was dismissed) with forcible oral copulation (§ 288a, subd. (c)(2)). It was further alleged as to counts 1, 2, 3 and 9 that defendant committed those offenses during the commission of a first degree burglary (§ 667.61, subds. (a)-(d)(4)). Defendant pleaded not guilty and denied the special allegations.

At trial, T.H. recounted the attack and identified defendant. Officer Cunningham described his investigation and the apprehension of defendant. The sexual assault nurse examiner who examined T.H. described her injuries and the procedure by which swabs were taken from her. The sexual assault nurse examiner who examined defendant described the examination and the procedure by which swabs were taken from him.

Defendant presented no evidence.

The jury found defendant guilty on counts 1, 2, 3, 4, 6, 7 and 9 and found true the special allegations concerning those counts. The jury found defendant guilty on count 5 (assault with a deadly weapon) of the lesser included offense of simple assault. The trial court denied probation and sentenced defendant to state prison for a term of 44 years 8

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

months to life, consisting of 25 years to life on the first sexual penetration count, a consecutive 6 years on the second sexual penetration count, a consecutive 6 years for attempted sodomy by force, a consecutive 1 year 8 months for kidnapping, and a consecutive 6 years for forcible oral copulation. The court imposed concurrent terms of 25 years to life on count 7 (assault to commit a felony) and six months on count 5 (simple assault). A four-year term was imposed on count 1 (burglary) but stayed (§ 654).

Defendant appealed.

DISCUSSION

A. Prosecutorial Misconduct

At the start of closing argument the prosecutor argued: "One thing to keep in mind as I go through my argument and also as the defense goes through his argument . . . is the evidence that the People put on, okay, it's something called uncontroverted. It means there's nothing that was challenged in the People's evidence. What you heard, whether or not it was from the witnesses, or it was evidence that you received in the form of photographs or diagrams or reports, nothing has been challenged." Toward the end of the argument the prosecutor stated: "Another important factor that we need to look at and consider is the fact of the identification because . . . there's no doubt that [T.H.] was injured. What she stated, her demeanor on the stand, the photographs, all corroborate what she stated. There's nothing that was presented, even on cross-examination, to dispute what she said."

Defendant contends these statements violated his constitutional right not to testify because only his testimony could have controverted T.H.'s testimony about the sexual acts he performed in the house. By encouraging the jury to consider that he had not testified, defendant argues, the prosecutor invited jurors to conclude T.H.'s testimony was true. We disagree.

The self-incrimination clause of the Fifth Amendment, made applicable to the states by the Fourteenth Amendment (*Malloy v. Hogan* (1964) 378 U.S. 1 [84 S.Ct. 1489, 12 L.Ed. 653]), prohibits a criminal defendant from being compelled to testify at trial. In *Griffin v. California* (1965) 380 U.S. 609, 615 [85 S.Ct. 1229, 14 L.Ed.2d 106], the

United States Supreme Court held that comment on a defendant's failure to testify may violate the Fifth Amendment. "Prosecutorial comment which draws attention to a defendant's exercise of his constitutional right not to testify, and which implies that the jury should draw inferences against defendant because of his failure to testify, violates defendant's constitutional rights." (*People v. Murtishaw* (1981) 29 Cal.3d 733, 757, disapproved on other grounds in *People v. Boyd* (1985) 38 Cal.3d 762, 773; *People v. Lewis* (2001) 25 Cal.4th 610, 670 [prosecutor prohibited from "commenting directly or indirectly on an accused's invocation of the constitutional right to silence"].) A prosecutor may comment on the state of the evidence (*People v. Mincey* (1992) 2 Cal.4th 408, 446), but "it is error for the prosecution to refer to the absence of evidence that only the defendant's testimony could provide." (*People v. Hughes* (2002) 27 Cal.4th 287, 372.) *Griffin* error is subject to harmless error review. (*United States v. Hasting* (1983) 461 U.S. 499, 507-509 [76 L.Ed.2d 96].)

a. Defendant forfeited any claim of *Griffin* error

Defendant failed to object to the prosecutor's allegedly improper comments as *Griffin* error and never requested that the court admonish the jury that he had a right not to testify or instruct that the jury could not infer evidence of guilt from his invocation of that right. Generally, "'"a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety."' [Citation.]" (*People v. McDermott* (2002) 28 Cal.4th 946, 1001.) This requirement has been applied repeatedly to cases involving claims of *Griffin* error. (E.g., *People v. Turner* (2004) 34 Cal.4th 406, 420 [defendant's failure to object to alleged *Griffin* error forfeited claim on appeal]; *People v. Mesa* (2006) 144 Cal.App.4th 1000, 1006-1007.) "The only exception is for cases in which a timely objection would have been futile or ineffective to cure the harm. [Citation.]" (*People v. Mesa*, *supra*, 144 Cal.App.4th at p. 1007.)

On this record, nothing suggests either that a proper objection by defendant's counsel would have been overruled or an immediate admonition ineffective. Defendant

was required to assert a timely and specific objection, and his failure to do so constitutes a forfeiture of his claim of prosecutorial misconduct on appeal. (*People v. Turner*, *supra*, 34 Cal.4th at p. 421.)

b. No *Griffin* error occurred

"[A]lthough '"*Griffin* forbids either direct or indirect comment upon the failure of the defendant to take the witness stand,"' the prohibition '"does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or call logical witnesses."' [Citation.]" (*People v. Hughes*, *supra*, 27 Cal.4th at p. 372.) It is error only "for a prosecutor to state that certain evidence is uncontradicted or unrefuted when that evidence could not be contradicted or refuted by anyone other than the defendant testifying on his or her own behalf." (*Id*. at p. 371.) Thus, "[a]s a general principle, prosecutors may allude to the defense's failure to present exculpatory evidence." (*People v. Guzman* (2000) 80 Cal.App.4th 1282, 1289.) "[S]uch commentary does not ordinarily violate *Griffin* or erroneously imply that the defendant bears a burden of proof [citations]." (*People v. Lewis* (2004) 117 Cal.App.4th 246, 257.)

Here, the prosecutor's two brief comments do not constitute *Griffin* error. In the first, the prosecutor stated the People's evidence, as a whole, was uncontradicted. The People's evidence concerned such matters as the police investigation, the handling of physical evidence, defendant's identification, and medical examinations of T.H.'s and defendant's injuries. In this setting, we view the challenged comment as nothing more than proper fair comment "on the general state of the evidence rather than an assertion that the prosecution's evidence was not contradicted by defendant personally." (*People v Hughes*, *supra*, 27 Cal.4th at p. 373.)

The prosecutor's second comment was that T.H.'s testimony was uncontradicted. The prosecutor said, "What she stated, her demeanor on the stand, the photographs, all corroborate what she stated. There's nothing that was presented, even on cross-examination, to dispute what she said." This statement was not directed at defendant's failure to testify. T.H.'s testimony that defendant caused her to suffer several injuries could have been refuted other than by defendant's testimony. For example, the defense

might have called others to testify that T.H. was prone to fabrication, or it might have presented photographic evidence showing she sustained no injuries. This comment too was nothing more than a fair comment on the state of the evidence. Defendant does not suggest, and nothing in the record indicates, that every portion of the prosecution's evidence could be contradicted only by defendant's testimony.

c. If *Griffin* error occurred, it was harmless

Even if the prosecutor did commit *Griffin* error, we find that any error was unquestionably harmless under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. Two elements bear on the determination of whether *Griffin* error is harmless beyond a reasonable doubt. The first is the seriousness of the error. The second is the impact of the error on the jury's consideration of the evidence, given the strength of the case against the defendant. (See *People v. Vargas* (1973) 9 Cal.3d 470, 478-481.) *Griffin* error is harmless beyond a reasonable doubt "when the evidence of guilt is overwhelming and the constitutional error is minor." (*People v. Guzman*, *supra*, 80 Cal.App.4th at p. 1290.) An appellate court looks to the "frequency, intensity and purpose" of the prosecutor's comments to determine if they were harmless beyond a reasonable doubt. (*Ibid*.) In *Guzman*, reversible *Griffin* error was found where the prosecutor alluded to a defendant's failure to testify four times and then used a demonstrative chart to get that point across. "The combined effect of these techniques was to cast aspersion on [the defendant's] failure to testify." (*Ibid*.) But "brief and mild references to a defendant's failure to testify, without any suggestion that an inference of guilt be drawn therefrom, are uniformly held to constitute harmless error." (*People v. Hovey* (1988) 44 Cal.3d 543, 572; *People v. Bradford* (1997) 15 Cal.4th 1229, 1339-1340.)

Further, where the case against defendant is overwhelming and the commentary brief, *Griffin* error is usually deemed harmless. (*People v. Vargas*, *supra*, 9 Cal.3d at pp. 478-481.)

Here, the prosecutor's comments were harmless beyond a reasonable doubt. First, they did not directly refer to defendant's failure to testify, but raised the issue only by

implication. As such, they were less prejudicial than comments directly referencing a defendant's assertion of the privilege. (Cf. *People v. Giovianni* (1968) 260 Cal.App.2d 597, 604-605 [*Griffin* error when prosecutor made several comments inviting the jury to draw inferences from defendant's failure to testify]; *People v. Northern* (1967) 256 Cal.App.2d 28, 30-31.) The impact of the prosecutor's statements on the jury was likely insignificant.

Second, the evidence that defendant attacked T.H. was strong. T.H. identified defendant's clothing and necklace, which he was still wearing when arrested. When he was arrested, defendant also possessed the magazine receipt on which he had written T.H.'s name and address. And T.H.'s account was corroborated by medical examinations of her and defendant and by defendant's DNA found on T.H. These facts overwhelmingly suggest defendant violently attacked and sexually violated T.H.

Finally, jurors were instructed that a defendant in a criminal trial has a constitutional right not to testify and told not to draw any inference from the fact that a defendant does not testify, and they were admonished to consider only the evidence, which did not include counsels' argument or suggestive questions. We assume the jury followed instructions. (See *People v. Avila* (2006) 38 Cal.4th 491, 574.)

Any *Griffin* error was harmless beyond a reasonable doubt.

B. Sufficiency of the Evidence of Kidnapping

Defendant contends insufficient evidence supported the kidnapping conviction because the movement that formed the basis for the conviction—from downstairs to upstairs in T.H.'s home—was insubstantial. We disagree.

"Every person who forcibly, or by any other means of instilling fear, . . . detains . . . any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping." (§ 207, subd. (a).) To prove the offense of kidnapping, the prosecution is required to prove (1) the victim was unlawfully moved by use of force or fear, (2) the movement was without her consent, and (3) the movement was for a substantial distance. (*People v. Jones* (2003) 108 Cal.App.4th 455, 462.) The definition of the offense does not prescribe a movement of

any specific number of feet, but the movement must be more than that which would be regarded as trivial, slight or insignificant.

"'[A] primary reason forcible asportation is proscribed by the kidnapping statutes is the increase in the risk of harm to the victim that arises from the asportation.' [Citation.]" (*People v. Morgan* (2007) 42 Cal.4th 593, 612.) Thus, "in determining whether the movement is '"substantial in character"' [citation], the jury should consider the totality of the circumstances," including "not only the actual distance the victim is moved, but also such factors as whether that movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, and increased both the danger inherent in a victim's foreseeable attempts to escape and the attacker's enhanced opportunity to commit additional crimes." (*People v. Martinez* (1999) 20 Cal.4th 225, 237 (*Martinez*).) Although the jury "may consider a victim's increased risk of harm, it may convict of simple kidnapping without finding an increase in harm, or any other contextual factors. Instead, . . . the jury need only find that the victim was moved a distance that was 'substantial in character.' [Citations.] To permit consideration of 'the totality of the circumstances' is intended simply to direct attention to the evidence presented in the case, rather than to abstract concepts of distance. At the same time, we emphasize that contextual factors, whether singly or in combination, will not suffice to establish asportation if the movement is only a very short distance. [¶] In addition, in a case involving an associated crime, the jury should be instructed to consider whether the distance a victim was moved was incidental to the commission of that crime in determining the movement's substantiality. . . . [S]uch consideration is relevant to determining whether more than one crime has been committed . . . ." (*Ibid*.)

Our review is for substantial evidence. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Defendant forced T.H. from the dining room to an upstairs bedroom. While downstairs, T.H. had unsuccessfully attempted to escape out the front door and screamed and kicked a fireplace and a door to attract neighbors. Once upstairs, the likelihood of detection was decreased because a neighbor or passerby would be less likely to hear T.H.

kicking things. The danger inherent in T.H.'s foreseeable attempts to escape increased because she would now either have to run down the stairs to exit on the ground floor or escape through a window on the second floor. The decreased likelihood of detection and restricted escape routes gave defendant an enhanced opportunity to beat T.H. further—which he did—and commit other crimes, including robbery. A reasonable jury considering all of these factors could therefore have found that the distance T.H. was moved was substantial in character.

Defendant argues that when an associated crime is involved, such as the robbery that occurred here, there can be no violation of section 207 when asportation of the victim is incidental to the commission of the crime. That is "an incorrect statement of the law. To the contrary, *Martinez* held: . . . '[I]n a case involving an associated crime, the jury should be instructed to consider whether the distance a victim was moved was incidental to the commission of that crime *in determining the movement's substantiality*.' [Citation.] Put more directly, one of the *additional* factors to be considered *in determining the movement's substantiality* is whether the movement of the victim was for a distance beyond that which was incidental to the commission of an associated crime. Thus, whether the movement was over a distance merely incidental to an associated crime is simply one of several factors to be considered by the jury (when permitted by the evidence) under the 'totality of circumstances' test enunciated in *Martinez*. The factor is *not* a separate threshold determinant of guilt or innocence, separated from other considerations bearing on the substantiality of the movement . . . ." (*People v. Bell* (2009) 179 Cal.App.4th 428, 440.)

Whether defendant's movement of T.H. upstairs was incidental to the robbery was only one factor of many to consider in determining whether she was moved a substantial distance, and the jury was entitled to conclude the distance was substantial even if the movement was incidental to the additional crime.

C. Count Seven

In count 7, defendant was charged with assault with intent to commit "rape, attempted sodomy, or oral copulation" during the commission of a burglary. (§ 220,

subd. (b).) On the verdict form, the jury found defendant guilty of "assault to commit a felony during the commission of a first degree burglary, with the intent to commit rape, attempted sodomy or oral copulation . . . ." But the jury was instructed as to count 7 only on assault with intent to commit rape during a burglary, not assault to commit sodomy or oral copulation. (The jury was instructed on attempted sodomy and oral copulation only in connection with counts 4 and 9.)

Defendant argues he could be convicted under none of the theories upon which count 7 was based. First, defendant argues no evidence supported a conviction for assault to commit rape because no evidence suggests he tried to have sexual intercourse with T.H., place his penis near her vagina, or attempt to penetrate her vagina with his penis. The argument is without merit.

Section 261 defines rape as "an act of sexual intercourse accomplished with a person not the spouse of the perpetrator," under various situations, including intercourse accomplished against a person's will by force and violence. (§ 261, subd. (a)(2).) The requisite act of sexual intercourse is defined by an act of penetration. "Any sexual penetration, however slight, is sufficient to complete the crime." (§ 263.) "Penetration" means "sexual penetration and not vaginal penetration. Penetration of the external genital organs is sufficient to constitute sexual penetration and to complete the crime of rape even if the rapist does not thereafter succeed in penetrating into the vagina." (*People v. Karsai* (1982) 131 Cal.App.3d 224, 232, disapproved on other grounds in *People v. Jones* (1988) 46 Cal.3d 585, 600, fn. 8.) An assault with intent to commit a sexual offense is an aggravated attempt to commit the sexual offense. (See *People v. Ghent* (1987) 43 Cal.3d 739, 757.)

Defendant pushed T.H. into the house and closed the door, dragged her into the dining room, pulled down her pants and underwear, pushed her to the floor, held her down by choking her, and told her to spread her legs. He also took off his own pants and pulled her away from a couch when she tried to put her legs underneath it. The jury could have concluded from these facts that defendant intended to rape T.H. That he did not ultimately rape her was only one factor to consider.

Defendant argues the other two theories presented by the verdict form—assault with intent to commit attempted sodomy or oral copulation—were inadequate because there can be no intent to commit "attempted" sodomy, and no evidence suggested defendant attempted to orally copulate T.H. separate from the completed oral copulation. Because neither theory is viable, he argues, and because it cannot be determined from the record which of the three theories the jury relied on, his conviction on count 7 must be overturned. We disagree.

"A verdict is to be given a reasonable intendment and be construed in light of the issues submitted to the jury and the instructions of the court. It must be upheld when, if so construed, it expresses with reasonable certainty a finding supported by the evidence." (*People v. Radil* (1977) 76 Cal.App.3d 702, 710.)

Here, the record shows the jury convicted defendant in count 7 on only one theory—assault with intent to commit rape. The jury was instructed that defendant was charged in count 7 only with assault to commit rape, and that to convict him of that crime the prosecution was required to prove he intended to rape T.H. The court further instructed on the definition of intent to commit rape. During closing argument, the prosecutor urged the jury to convict defendant of assault to commit rape. The record thus demonstrates that the prosecution presented its case as to count 7 on one theory and the jury was instructed on only one theory.

Defendant also argues that insofar as he was convicted on count 7 of assault to commit sodomy or assault to commit forcible oral copulation, the conviction must be set aside because attempted sodomy is a lesser included offense of sodomy, for which he was convicted in count 4, and attempted forcible copulation is a lesser included offense of forcible oral copulation, for which he was convicted in count 9. Pursuant to the discussion immediately above, we reject this argument because it is clear from the record that defendant was convicted of assault with intent to commit rape, which is not a lesser included offense of the other offenses.

D. Burglary is a Lesser Included Offense of Assault to Commit Rape During a Burglary

Defendant was convicted under count 1 of first degree burglary and under count 7 of assault to commit rape during a first degree burglary. Because burglary is an element of both crimes, defendant argues, count 1 is a lesser included offense of count 7. The People concede the point and we agree.

If the facts alleged in an accusatory pleading include all of the statutory elements of a lesser offense, the latter is necessarily included in the former. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227-1228.) Section 220, subdivision (b), provides that, "Any person who, in the commission of a burglary of the first degree, . . . assaults another with intent to commit rape . . . shall be punished by imprisonment in the state prison for life with the possibility of parole." Thus, "assault with intent to commit rape during the commission of first degree burglary cannot be committed without also committing first degree burglary." (*People v. Dyser* (2012) 202 Cal.App.4th 1015, 1021.) The judgment must therefore be modified to dismiss the conviction on count 1.

E. Count 5 is a Lesser Included Offense of Count 7

Defendant contends the conviction on count 5 was a necessarily included offense of that on count 7. We agree.

Defendant first beat T.H. with his fists while he sexually violated her. He then told her not to struggle, jabbed her with a stick, and demanded money. Defendant was convicted in count 5 of simple assault as a lesser included offense of assault with a deadly weapon, to wit, a piece of wood, and in count 7 of assault with the intent to commit a felony, i.e., rape, during the commission of a first degree burglary. It is clear from the record that the two acts involved one assault to achieve one objective. Simple assault is a lesser included offense of assault with the intent to commit rape. (*People v. Carapeli* (1988) 201 Cal.App.3d 589, 595.) Therefore, the conviction on count 5 must be reversed.

F. Sentence on Count 4

Defendant was sentenced on count 4, attempted sodomy by force, to a consecutive middle term of six years. (§§ 664, 286, subd. (c)(2).) However, punishment

for an attempt is one-half the term of imprisonment prescribed upon a conviction of the offense. (§ 664, subd. (a).) Defendant thus contends the sentence on count 4 should have been three years at most, not six. Respondent agrees in part, but further notes that pursuant to section 1170.1, subdivision (a), when any person is convicted of two or more felonies and one or more subordinate consecutive terms of imprisonment are imposed, "[t]he subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed . . . ." Accordingly, the People argue, the sentence on count 4 should have been at most one year. We agree. The sentence must therefore be vacated and the matter remanded for resentencing. (*People v. Rojas* (1988) 206 Cal.App.3d 795, 802 [where trial court imposed erroneous sentence, remand was appropriate to allow the court to reconsider other sentencing choices].)

G. Sentence on Count 7

Defendant was sentenced to 25 years to life on count 7, assault with intent to commit rape in the commission of a first degree burglary. However, as defendant argues and the People concede, the proper sentence on that count was life with the possibility of parole. (§ 220, subd. (b).) The sentence imposed on count 7 must therefore be vacated and the matter remanded for resentencing.

H. Sentence on Counts 3 and 9

The People additionally note that the sentence as to counts 3 and 9 was unlawful. The trial court sentenced defendant on count 3, sexual penetration by a foreign object (§ 289 (a)(1)), and count 9, forcible oral copulation (§ 288a (c)(2), to consecutive terms of six years on each count. This would generally be correct under sections 288a and 289, but when forcible sexual penetration or forcible oral copulation is committed during a first degree burglary, the lawful sentence is 25 years to life.[2] (§ 667.61, subds. (a), (c)(5),

[2] An offense for which an indeterminate sentence can be imposed is not subject to section 1170.1. (§ 1168, subd. (b).)

(c)(7), (d)(4), (g).) The sentences imposed on counts 3 and 9 must therefore be vacated and the matter remanded for resentencing.

DISPOSITION

The trial court's judgment is reversed as to the sentence imposed and as to the conviction on counts one and five. The judgment is affirmed in all other respects. The matter is remanded for dismissal of count one and resentencing.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.