Filed 8/19/13 P. v. Fernandez CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. GERRADO FERNANDEZ, Defendant and Appellant.	B238775 (Los Angeles County Super. Ct. No. TA113109)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura R. Walton, Judge. Affirmed as modified.

David M. Thompson, 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, Paul M. Roadarmel, Jr., and Nima Razfar, Deputy Attorney General, for Plaintiff and Respondent.

Gerrado Fernandez appeals from the judgment entered following his conviction by jury on six counts: count 1, second degree robbery (Pen. Code, § 211); count 2, kidnapping (Pen. Code, § 207, subd. (a)); count 3, forcible oral copulation (Pen. Code, § 288a, subd. (c)(2)); count 4, forcible rape (Pen. Code, § 261, subd. (a)(2)); counts 5 and 6, sexual penetration with a foreign object (Pen. Code, § 289, subd. (a)(1)).[1] We direct the clerk of the superior court to amend the abstract of judgment and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Evidence

On April 1, 2010, around 1:00 a.m., Michael C. and his girlfriend Jill W. went to a bank ATM to withdraw money and then drove to their residence on Paramount Boulevard in the County of Los Angeles. Michael C. and Jill parked and got out of the car. As they walked toward their apartment, two men approached. Michael noticed that one of them was carrying a black gun that appeared to be a Glock and gleamed in the light from the street lamp. Michael had no doubt that the gun was real because he was familiar with guns. Jill stated that the gun looked real, describing it as steel black and "solid" in appearance. She thought it was a Glock 9-millimeter, based on what she had seen on television. The man holding the gun later was identified as appellant, and the other man as Denzel Witherspoon.

Appellant pointed the gun at Michael and Jill and demanded that they get on their knees and place their wallets, keys, and cell phone on the ground.

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[1] All further statutory references are to the Penal Code unless otherwise specified.

Witherspoon took their belongings, and appellant demanded to know Michael's PIN number for his bank card. Michael told him the number.

Appellant pointed the gun at Jill's face, grabbed her by the arm, and said, "You're coming with us." He pulled her and began walking toward a car parked nearby. When they reached the car, Witherspoon opened the back door, and appellant pushed her into the back seat of the car. Appellant sat next to her, and Witherspoon closed the door and got into the front passenger seat. There was already someone sitting in the driver's seat.

Michael, who was face down on the ground, heard some car doors slam, looked up, and saw a car speeding away. He could not see the license plate number. Michael was unable to get help from nearby residences, so he flagged down a motorist who allowed him to use his cell phone to call the police.

Jill was looking out the window of the car, but appellant told her to keep her head down. Appellant placed his hand on Jill's waist and began pulling her jeans down. Jill pushed his hand away and said, "Please don't," but appellant pointed the gun at her crotch and told her to remove her clothes. Jill again said, "Please don't do this," but appellant pulled her pants and underwear off and threw them out the window. Appellant pushed Jill's head into his lap, unzipped his pants, and pulled out his penis. Jill tried to lift her head up, but appellant pressed the barrel of the gun to the back of her head, put his penis into her mouth, and told her "to do it like I do for my man." Appellant pushed her head up and down on his penis.

Appellant let Jill sit up and asked her name. He then put his fingers into her vagina twice. He pushed Jill down on the seat, picked up a piece of clothing, and put it over her face. He then lifted her sweater, pushed her bra aside, and kissed her breast.

Appellant put the barrel of the gun between Jill's knees to spread her legs apart. The gun felt firm and hard to Jill, but she could not tell if it was metal or plastic. She again said, "Please don't do this to me." Appellant kneeled over her, and she heard a plastic wrapper. Appellant held Jill down with his body, spread her legs apart, put his penis in her vagina and thrust several times. Appellant told Witherspoon and the driver, "She's tight," and "Jill is a good girl." After appellant pulled his penis out, he put his fingers inside Jill's vagina again.

At some point, the car stopped at a gas station. The driver and Witherspoon got out of the car, and appellant told the driver to "use the card." Appellant then got into the front seat, pointed the gun at Jill's face, and told her, "Take care of my friend." Witherspoon got in the back seat with Jill, and the car left the gas station.

Witherspoon put his hand on Jill's head and pushed it into his lap onto his penis. Jill tried to pull back, but Witherspoon pushed her back down and put his penis in her mouth.

The car got on the freeway, and appellant said, "Jill wants to get out." Jill sat up, saw that they were on the freeway off ramp, and started to open the door, but appellant said, "No, not yet." The car turned onto Rosecrans Boulevard, and the driver slapped Jill's butt cheek. Appellant asked Jill if she wanted to get out of the car, and she said, "Yes, please." Appellant handed her Michael's jacket and told her to put it on, and he told the driver to stop the car.

Jill got out of the car, wearing only her sweater and an overcoat, and fell on the ground crying. She flagged down a passing police car being driven by Los Angeles County Sheriff's Department Deputy Joe Pacheco. Deputy Pacheco got out of his car and asked if she was Jill. She replied that she was and said, "They raped me. Please help." Jill gave Deputy Pacheco a description of the suspects.

Jill was taken by ambulance to a hospital, where a nurse performed a sexual assault examination on her and gave the evidence to Deputy Pacheco.

Later that morning, around 8:00 a.m. on April 1, appellant was seen on a surveillance video trying to use Michael's bank card at a Walmart. Appellant was seen around 8:30 a.m. that day on a surveillance video at a Circle K market where Michael's AAA card later was found. Around 9:30 a.m., appellant was seen on a surveillance video attempting to use Michael's bank card at a Kmart store, but the card was declined. Jill identified appellant on the surveillance video from the Circle K store.

In May 2010, Jill identified appellant in a six-pack photo lineup. Appellant subsequently was arrested and interviewed by detectives. The recording of the interview was played at trial.

During his interview, appellant admitted robbing Michael and Jill, stating that he was "the gun man." He said that his cousin was driving the car. They saw Michael get money from the bank, so they turned around and followed him. Appellant also admitted kidnapping Jill, forcing her to perform oral sex, and raping her. He ejaculated in the condom and threw it out the window of the car. Appellant stated that Witherspoon did the same to Jill, and then they "threw her out" of the car after exiting the freeway on Rosecrans. Appellant said they sold the stolen phone the following morning, and he and his girlfriend used the credit cards that night at Walmart and Kmart to purchase numerous items. Appellant claimed that he was under the influence of drugs at the time of the crimes.

The car they used during the crimes belonged to appellant's stepfather, Tremaine Cole, and Cole's wife, Teresa Bunton. Cole was Witherspoon's older brother. The driver of the car was Purnell Clifton, appellant's and Witherspoon's cousin.

In June 2010, Jill identified Witherspoon in a six-pack photo lineup. Witherspoon was arrested and interviewed in July 2010. The recording of the interview was played at trial.

Witherspoon stated that on the night of the crimes, he thought Clifton and appellant were going to the store, so he asked if he could go with them. Clifton parked the car in front of the bank, where they saw Michael and Jill get money from the ATM. They followed Michael and Jill home, and appellant robbed them at gunpoint and brought Jill back to the car. Witherspoon said that after appellant raped Jill, appellant told Witherspoon to get in the back seat and "get some head." Witherspoon did not want to, but he complied because appellant had a gun. Witherspoon stated that the gun was a pellet gun that belonged to his cousin.

Deputies executed a search warrant at Cole's residence and discovered a pellet gun and a .40-caliber firearm. Neither Jill nor Michael was able to identify either gun as the gun used in the robbery. Detective Mark Lorenz testified that, although the pellet gun did not look like a real weapon when he held it in his hand, it would from a distance. He further testified that a pellet gun pointed at someone's neck or temple at close range would inflict a serious bodily injury.

Defense Evidence

Codefendant Witherspoon testified in his own behalf. He testified that he was 16 years old at the time of the crimes and had never been involved with a gang. Cole is Witherspoon's oldest brother and appellant's stepfather, so Witherspoon had known appellant his entire life. They saw each other regularly and at family gatherings. Witherspoon testified that appellant was a gang member. Appellant had previously told Witherspoon he had robbed and shot people in the past.

On the day of the crimes, appellant, Witherspoon, Clifton, and several other people spent the afternoon at Cole's house watching television and playing video games. That night, Witherspoon decided to go in the car with Clifton and appellant because he thought they were going to the store. He testified that he would not have gone with them if he had known they were planning to rob someone. During Witherspoon's testimony, he described the events as he had in his police interview. He further stated that he did what appellant told him to do because he was afraid of appellant, who was pointing the gun at Witherspoon.

Witherspoon testified that he thought the gun was real. However, several days later, he saw his 15-year-old cousin playing with a gun that he thought was the one used in the robbery, and he realized it was a pellet gun. Witherspoon thought that it looked like a real gun. Witherspoon never told the police about the crimes because he was afraid of appellant and afraid of going to prison.

Appellant's mother, Shemeshia Page, testified that at the preliminary hearing in February 2011, she overheard a conversation between Jill and Detective Lorenz outside the courtroom. According to Page, Detective Lorenz told Jill where appellant was sitting in the courtroom and what he was wearing. Page also testified that officers executing a search warrant at her home did not recover any weapons.

Rebuttal Evidence

Detective Lorenz denied telling Jill that appellant or Witherspoon was going to be in the courtroom prior to the preliminary hearing. He also denied telling Michael to identify either defendant at the hearing. According to Detective Lorenz, a female detective, Jacqueline Luna, escorted Jill into the courtroom because it was a rape case and Detective Luna was the lead investigator. Detective

Luna testified that she escorted Jill into the courtroom at the preliminary hearing and that she never told Jill to identify appellant during the hearing.

Procedural Background

Appellant was charged by information with second degree robbery (count 1; § 211), kidnapping to commit rape (count 2; § 209, subd. (b)(1)), forcible oral copulation (count 3; § 288a, subd. (c)(2)), forcible rape (count 4; § 261, subd. (a)(2)), and sexual penetration by a foreign object (counts 5 and 6; § 289, subd. (a)(1)). The information alleged that appellant personally used a firearm during the offenses (§§ 667.61, subd. (b), 12022.53, subd. (b)). It was further alleged that appellant kidnapped the victim and the movement of the victim substantially increased the risk of harm to the victim. (§ 667.61, subds. (a) & (d).) The jury found appellant guilty of the lesser-included offense of kidnapping in count 2 (§ 207, subd. (a)), guilty as charged on the other counts, and found the special allegations to be true.

The trial court sentenced appellant to a total state prison term of 112 years to life, calculated as follows: count 1, the upper term of 5 years plus 10 years for the firearm enhancement; count 2, the midterm of 5 years plus 10 years for the firearm enhancement, stayed pursuant to section 654; count 3, 25 years to life plus 10 years for the firearm enhancement; count 4, 15 years to life; count 5, the upper term of 8 years plus 10 years for the firearm enhancement, imposed concurrently; count 6, 25 years to life plus 10 years for the firearm enhancement. The court sentenced appellant to a term of 12 years in an unrelated case in which appellant was convicted of five counts of second degree robbery. Appellant filed a timely notice of appeal.

DISCUSSION

Appellant claims that he received ineffective assistance of counsel. He further contends that the trial court erred in sentencing him to consecutive terms because the sexual offenses were not committed on separate occasions. Finally, appellant contends that the abstract of judgment should be corrected.

I. *Ineffective Assistance of Counsel*

Appellant asserts that he received ineffective assistance of counsel in three ways. First, he contends that trial counsel should have objected to testimony that a gun not used in the crimes was found in the search of Cole's home. Second, he asserts that his attorney provided ineffective assistance by failing to object to alleged prosecutorial misconduct. Third, he contends that counsel should have requested an instruction that a pellet gun is not a firearm. We conclude that appellant did not receive ineffective assistance of counsel and that, even if he did, he was not prejudiced by the alleged ineffective assistance.

"'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.] A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. . . . If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory

explanation. [Citation.]' [Citation.]" (*People v. Gamache* (2010) 48 Cal.4th 347, 391 (*Gamache*).) "'Because the appellate record ordinarily does not show the reasons for defense counsel's actions or omissions, a claim of ineffective assistance of counsel should generally be made in a petition for writ of habeas corpus, not on appeal.' [Citation.]" (*People v. Lucero* (2000) 23 Cal.4th 692, 728-729.)

In addition, "*Strickland v. Washington* (1984) 466 U.S. 668, 697, informs us that 'there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'" (*In re Cox* (2003) 30 Cal.4th 974, 1019-1020 (*Cox*).)

A. *Failure to Object to Evidence of Gun*

Appellant contends that his trial counsel should have objected to testimony elicited by Witherspoon's counsel during recross-examination of Detective Lorenz that officers discovered a .40-caliber firearm when they searched Cole's residence.

Michael and Jill both testified that the gun appellant used during the crimes looked real. Witherspoon testified that he thought the gun was real, but he realized it was only a pellet gun when he saw his cousin playing with it several days after the crime.

During cross-examination by appellant's counsel, Detective Lorenz testified that officers recovered a pellet gun when they executed a search warrant at Cole's residence. The pellet gun was admitted into evidence. On further cross-examination by Witherspoon's counsel, Detective Lorenz stated that, during the search of Cole's residence, officers also found a .40-caliber firearm which was admitted into evidence. Detective Lorenz testified that Michael and Jill were not able to identify either the pellet gun or the firearm as the weapon used during the crimes. No other firearms were recovered during the investigation of the case, and officers never found any gun that Jill and Michael were able to identify as that used in the crimes.

Appellant contends that his trial counsel rendered ineffective assistance by failing to object to the admission of the evidence of the .40-caliber firearm because the firearm was inadmissible as irrelevant on two grounds. First, he argues that there was no evidence connecting him to Cole's residence "except as possibly an occasional visitor." Second, he contends that there was no evidence connecting him to the firearm, such as fingerprints or DNA, nor was there any evidence that he had access to the firearm. We disagree with both contentions.

First, we disagree with appellant's characterization of himself as "an occasional visitor" to Cole's residence. The evidence at trial established that Cole was Witherspoon's older brother and appellant's stepfather, and that appellant and Witherspoon essentially "grew up together," seeing each other at holidays and other family gatherings. Appellant was at Cole's residence on the day of the crimes, playing video games with a group of people. The record does not support appellant's contention that he was only an occasional visitor to Cole's residence.

Second, although there was no direct evidence linking appellant to the firearm, there was circumstantial evidence. The firearm was discovered during a

search of Cole's residence, and the evidence established that appellant, Cole, and Clifton left from Cole's residence to commit the crimes. In addition, contrary to appellant's contention that the evidence showed only that his family members possessed firearms, Witherspoon testified that appellant had admitted shooting people in the past.

Appellant relies on *People v. Riser* (1956) 47 Cal.2d 566 (*Riser*), overruled on another ground by *People v. Morse* (1964) 60 Cal.2d 631. In *Riser*, the prosecution established that the bullets found at the scene of a homicide were from a certain type of weapon but also introduced evidence that the defendant had in his possession numerous other types of weapons and ammunition. The California Supreme Court stated that, "[w]hen the specific type of weapon used to commit a homicide is not known, it may be permissible to admit into evidence weapons found in the defendant's possession some time after the crime that could have been the weapons employed." (*Id.* at p. 577; see also *People v. Homick* (2012) 55 Cal.4th 816, 876 ["'[W]hen weapons are otherwise relevant to the crime's commission, but are not the actual murder weapons, they may still be admissible.'"].) However, *Riser* further held that when the prosecution relies on a specific type of weapon, "it is error to admit evidence that other weapons were found in his possession, for such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons. [Citations.]" (*Riser*, *supra*, 47 Cal.2d at p. 577.)

Riser is distinguishable because, in that case, the prosecution relied on a specific type of weapon to commit the crime. Here, it was not clear what type of weapon was used to commit the crime. Although Witherspoon testified that it was a pellet gun, Michael and Jill both testified that the weapon looked like a real gun. Both Michael and Jill thought that appellant was holding a Glock, and they were

unable to identify the pellet gun or the .40-caliber firearm as the weapon used in the crime.

As respondent contends, it is likely that trial counsel's decision not to object to the firearm was a tactical decision because the victims' inability to identify it as the weapon used during the crimes challenged the credibility of their testimony that a real gun was used. (See *People v. Carpenter* (1999) 21 Cal.4th 1016, 1047-1048 [suggesting that defense counsel did not object to testimony about two different guns because it may have helped cast doubt on the witness' credibility].) Nonetheless, because the record on appeal sheds no light on why counsel failed to object to the admissibility of the firearm, the ineffective assistance claim must be rejected. (*Gamache*, *supra*, 48 Cal.4th at p. 391.)

B. *Alleged Prosecutorial Misconduct*

The information alleged as to all six counts that appellant personally used a firearm within the meaning of section 12022.53, subdivision (b), and the jury found the allegation to be true. Appellant contends that his trial counsel rendered ineffective assistance by failing to object when the prosecutor allegedly misstated the law regarding the firearm allegation during closing argument. He argues that the prosecutor implied that the definition of a firearm included a pellet gun, thus misleading the jury into finding the firearm allegation true.

"To rise to the level of deprivation of the Fourteenth Amendment to the federal Constitution, prosecutorial misconduct must infect the trial with such unfairness as to make the conviction a denial of due process. [Citations.] Misconduct by a prosecutor that does not render a criminal trial fundamentally unfair is error under state law if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. [Citation.]

Misconduct that infringes upon a defendant's constitutional rights mandates reversal of the conviction unless the reviewing court determines beyond a reasonable doubt that it did not affect the jury's verdict. [Citations.] A violation of state law only is cause for reversal when it is reasonably probable that a result more favorable to the defendant would have occurred had the district attorney refrained from the untoward comment. [Citations.]" (*People v. Pigage* (2003) 112 Cal.App.4th 1359, 1375.)

The jury was instructed, pursuant to CALCRIM No. 3115 and No. 3146, that "[a] firearm is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion." (See §§ 12001, 16520, subd. (a).)[2]

"In order for the court to impose on appellant the 10-year sentence enhancement mandated by section 12022.53, subdivision (b), the prosecution was required to prove beyond a reasonable doubt that the object appellant used, which looked like a gun, was a 'firearm' under that statute." (*People v. Hunter* (2011) 202 Cal.App.4th 261, 276.) Pellet guns do not qualify as a firearm "'because, instead of explosion or other combustion, they use the force of air pressure, gas pressure, or spring action to expel a projectile.' [Citation.]" (*People v. Law* (2011) 195 Cal.App.4th 976, 983, quoting *People v. Monjaras* (2008) 164 Cal.App.4th 1432, 1435 (*Monjaras*).)

At closing argument, the prosecutor stated that "the personal use of a firearm is alleged specifically as to [appellant]. The only thing that needs to be proven as to the personal use of a firearm is that [appellant] displayed the weapon in a

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[2] The instruction was taken from former section 12001, which was amended effective January 1, 2012. Now, instead of setting forth the definition of a firearm, the statute states only that, "[a]s used in this title, 'firearm' has the meaning provided in subdivision (a) of Section 16520."

menacing manner. [¶] The firearm does not need to be recovered. And, in fact, Jill . . . and . . . [Michael] were both specific as to how the gun looked. It looked real, it was black, and it was a semiautomatic which they believed to be real under the circumstances."

When the prosecutor discussed the section 12022.53 firearm allegation during rebuttal argument, he addressed arguments by appellant's and Witherspoon's attorneys that a pellet gun was used during the crimes. He stated that appellant's attorney "makes an issue with regards to the pellet gun. The only person that says it was a pellet gun in this case is [appellant] in his statement and . . . Witherspoon in his statement. But you look at the reasonableness and as to what Jill and [Michael] thought of the gun on the night of April 1, 2010: a gun that's pointed to your face in the commission of a robbery, held up against your head in the car while you're raped and forced to orally copulate and forced to have fingers stuck in your vagina, in their minds, in Jill and [Michael's] mind, that was a real gun, which is why Jill complied, which is why [Michael] complied.

"The instruction as to the 12022.53, the gun allegation, specifically says: 'a firearm is any device designed to be used as a weapon from which a projectile discharged.' It doesn't say a bullet. It doesn't say a pellet gun. It just says a projectile that is to be discharged. [¶] And in this case, [appellant] displayed that weapon in a menacing manner, which is the only requirement that needs to be met in this case."

The prosecutor's argument that section 12022.53 only requires a projectile to be discharged does incorrectly imply that a pellet gun is a firearm for purposes of the firearm allegation. Assuming, without deciding, that trial counsel's failure to object to the misstatement constituted ineffective assistance, we nonetheless conclude that appellant did not suffer prejudice because it is not reasonably

probable that a different result would have been reached. There was compelling circumstantial evidence for the jury to find that appellant used a real firearm, not a pellet gun, during the commission of the offenses. (See *Cox*, *supra*, 30 Cal.4th at pp. 1019-1020.)

Because most victims do not have the "composure and opportunity to closely examine the object" and generally lack the expertise to tell whether an object is a real firearm, circumstantial evidence alone is sufficient to support a finding that the object was a real firearm. (*Monjaras*, *supra*, 164 Cal.App.4th at p. 1436.) Thus, when the defendant commits an offense "by displaying an object that looks like a gun, the object's appearance and the defendant's conduct and words in using it may constitute sufficient circumstantial evidence to support a finding that it was a firearm within the meaning of section 12022.53, subdivision (b)." (*Id.* at p. 1437.)

Here, appellant pointed the gun at Michael and Jill when he robbed them, and he pointed it at Jill's face when he grabbed her and pulled her to his car. He pointed the gun at Jill's crotch when she tried to stop him from removing her pants, and he pressed the barrel of the gun into the back of her head when he forced her to orally copulate him. He also used the barrel of the gun to spread her legs apart before raping her, and he pointed it at her when he told her to orally copulate Witherspoon.

Michael testified that he was familiar with guns because he went shooting "quite often." He testified that he had no doubt that the gun was real, describing how the gun gleamed in the street light and stating that it looked like a Glock to him. Jill testified that the gun looked real to her because the color was "steel black" and it looked solid. In addition, she testified that the gun felt "firm and

hard" when appellant used it to spread her legs apart before raping her, although she could not tell if it was plastic or metal.

Moreover, the only evidence that the weapon was a pellet gun was Witherspoon's testimony and his statement to detectives. During appellant's interview with detectives, which was played for the jury, appellant did not mention a pellet gun. He told the detective that he was the "gun man" during the robbery without stating that he used a pellet gun. He also admitted that, when he told Jill to orally copulate Witherspoon, the gun was on the dashboard and she saw it, implying that was the reason she cooperated. He also admitted turning around with the gun to tell her to finish.

The appearance of the weapon, appellant's conduct and his words in using it, the testimony of both victims, and appellant's statements during his interview constitute sufficient circumstantial evidence to support the jury's finding that appellant used a firearm in the commission of the offenses. Thus, even if trial counsel rendered ineffective assistance by failing to object to the prosecutor's misstatement, appellant was not prejudiced thereby.

C. *Instruction that Pellet Gun is not a Firearm*

Appellant further contends that trial counsel provided ineffective assistance by failing to request a pinpoint instruction that a pellet gun is not a firearm. We conclude that, even if counsel provided ineffective assistance, appellant was not prejudiced for the same reason that he was not prejudiced by counsel's failure to object to the prosecutor's misstatement about the firearm allegation. That is, even if the jury had been instructed that a pellet gun is not a firearm, it is not reasonably probable that a different result could have been reached on the firearm allegation.

II. *Consecutive Sentencing*

Appellant contends that the trial court erred in imposing consecutive sentences for some of the sex counts pursuant to section 667.6, subdivision (d). The court imposed consecutive terms for the forcible oral copulation (count 3), forcible rape (count 4), and sexual penetration convictions (count 6), although it imposed the second sexual penetration count (count 5) to run concurrently. We conclude that the trial court did not err in imposing consecutive sentences.

"Section 667.6, subdivision (d), provides in part: 'A full, separate, and consecutive term shall be served for each violation of . . . paragraph (2) . . . of subdivision (a) of Section 261, . . . subdivision (a) of Section 289, . . . or of committing . . . oral copulation in violation of Section . . . 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim . . . if the crimes involve . . . the same victim on separate occasions.

"'In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his . . . actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his . . . opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions.' [Citations.] . . . [¶] Once a trial judge has found under section 667.6, subdivision (d), that a defendant committed offenses on separate occasions, we may reverse only if no reasonable trier of fact could have decided the defendant had a reasonable opportunity for reflection after completing an offense before resuming his assaultive behavior." (*People v. Garza* (2003) 107 Cal.App.4th 1081, 1091-1092, italics omitted.)

We disagree with appellant's contention that no reasonable trier of fact could decide that he had a reasonable opportunity for reflection between the different sex offenses. After the forcible oral copulation conduct, appellant let Jill sit up and asked her name. He then sexually penetrated her. After he penetrated her twice, he forced her to change positions by pushing her down on the seat; he covered her face, lifted her sweater, and kissed her breast. He then leaned back and used the gun to force her legs apart. Jill begged him to stop, but appellant took out a condom, unwrapped it, and put it on before raping her. The record amply supports the trial court's finding that appellant had the opportunity to reflect on his conduct before resuming his assaultive behavior. He paused to let her sit up and to ask her name between the oral copulation and sexual penetration offenses, and he changed her position and took the time to put on a condom before raping her. The trial court did not err in imposing consecutive sentences.

III. *Abstract of Judgment*

Appellant contends that the abstract of judgment contains two errors and so should be amended. "'It is not open to question that a court has the inherent power to correct clerical errors in its records so as to make these records reflect the true facts. [Citations.] The power exists independently of statute and may be exercised in criminal as well as in civil cases. [Citation.]' . . . [¶] It is, of course, important that courts correct errors and omissions in abstracts of judgment." (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

We direct the clerk of the superior court to make the following two corrections to the abstract of judgment.

First, appellant was convicted in count 2 of simple kidnapping (§ 207, subd. (a)), but the abstract of judgment incorrectly describes count 2 as kidnapping to

commit a crime. Second, appellant was convicted in count 6 of sexual penetration by a foreign object pursuant to section 289, subdivision (a)(1), but the abstract of judgment cites section 288a, subdivision (c)(2), which is the statute regarding forcible oral copulation. We shall order that the abstract of judgment be corrected.

DISPOSITION

We direct the clerk of the superior court to amend the abstract of judgment to reflect that appellant's conviction under count 2 was simple kidnapping and the conviction under count 6 was pursuant to section 289, subdivision (a)(1), and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J. SUZUKAWA, J.