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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MAJESTIC ZULU, Defendant and Appellant.	B270932 (Los Angeles County Super. Ct. No. BA437946)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig Richman, Judge. Affirmed as modified.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Majestic Zulu appeals from the judgment after his convictions for rape, sodomy, sexual penetration, kidnapping for the purpose of robbery, and first degree robbery. Appellant claims that the trial court's stated reason for imposing consecutive sentences was not supported by the record and that the sentence for robbery should have been stayed pursuant to Penal Code section 654.[1] We hold that any error in imposing consecutive sentences was harmless and does not warrant remand for resentencing. We agree, however, that the sentence for robbery must be stayed.

FACTUAL BACKGROUND[2]

At the time of the events underlying his conviction, appellant was 43 years old and working as a male prostitute. He met O.N.[3] while she was waiting at a bus stop. O.N. was a 20-year-old woman from Japan and had been in the United States a little over a week. She was staying with a host family while studying hip hop dance and English. Appellant and O.N. talked, and O.N. thought appellant "seemed sweet." Appellant asked for her phone number, and she gave it to him.

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1 All further statutory references are to the Penal Code unless otherwise indicated.

2 We limit our recitation of the facts to those relevant to the issues on appeal. Because we review the court's sentencing decision for substantial evidence (see *post*), we present the facts in the light most favorable to the court's determination and " 'presume in support of the [court's decision] the existence of every fact the trier of fact reasonably could infer from the evidence.' " (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890.)

3 We refer to the victim by her initials to protect her privacy.

About a week later, appellant contacted O.N. and invited her to a movie. They met in front of a restaurant near the house where she was staying. They bought some liquor, and appellant took her to a motel. They got a room, where they talked and drank the liquor. Eventually, appellant began touching O.N.'s legs. She told him to stop. Appellant became "very angry" and struck O.N. in the face.

O.N. continued to resist appellant's touching, but every time she did he punched her in the face. O.N. could not remember how many times appellant punched her, but said "it was a lot." He then removed her clothes, continuing to hit her as she resisted.

Once appellant had removed O.N.'s clothes, he touched her "[a]ll over [her] body" while continuing to hit her in the face and body. He choked her with one hand to the point that she was unable to breathe.[4] While choking her, he touched her breasts and vagina, and inserted his fingers into her vagina and anus. Then he inserted his penis into her vagina and anus.

O.N. continued to try to stop appellant, and he continued hitting her. She stopped resisting at some point because her "body hurt." Appellant stopped hitting O.N. sometime after she ceased resisting.

Appellant eventually stopped the sexual assault and took O.N. to the shower, where he washed her entire body. He then laid her down on the bed and returned to the bathroom. O.N. heard water running and saw appellant put her clothes on top of the air conditioning unit. Appellant took O.N.'s wallet and wiped

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[4] O.N. testified that appellant choked her "[a] few times," but her testimony did not specify when those attacks took place in relation to the other events she described.

down all the cards inside. He took $300 and 25,000 Japanese yen[5] from the wallet, and also took her two cell phones.

Appellant then touched O.N.'s body, and again inserted his fingers in her vagina and anus. He again inserted his penis in her vagina, and possibly her anus.[6]

Afterwards, appellant told O.N. to put her clothes back on. He walked her to an automated teller machine (ATM) and directed her to withdraw some money. When she was unable to withdraw any after several attempts, appellant took her watch. They rode together on a bus and in a taxi, and appellant dropped O.N. off near her home.

PROCEDURE

Appellant was charged in an information with two counts of forcible rape (§ 261, subd. (a)(2)), two counts of sodomy by use of force (§ 286, subd. (c)(2)(A)), two counts of sexual penetration by a foreign object (§ 289, subd. (a)(1)(A)), one count of kidnapping to commit another crime (robbery) (§ 209, subd. (b)(1)), and one count of first degree robbery (§ 211). It was alleged as to the counts for rape, sodomy, and sexual penetration that appellant had inflicted great bodily injury on the victim. (§§ 667.61, subds. (a), (d), 12022.8.) It was further alleged that appellant had been convicted of a prior serious felony. (§ 667, subd. (a)(1).)

The jury convicted appellant of one count each of rape, sodomy, and sexual penetration, and found the allegation of great bodily injury to be true for each count. The jury convicted appellant of one additional count each of rape and sexual

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[5] 25,000 yen is approximately $225.

[6] When asked if appellant put his penis in her anus during the assault that followed the shower, O.N. said, "I think so." The jury deadlocked on the issue.

penetration, finding the allegation of great bodily injury not to be true. The jury also convicted appellant of both the kidnapping and first degree robbery charges. The jury deadlocked on the second sodomy charge, which the prosecution dismissed. The court found that the prior conviction allegation had not been proven.

The court sentenced appellant to three terms of 25 years to life for the three sex offenses for which the great bodily injury allegation had been found true, and two 8-year terms for the two sex offenses for which the allegation of great bodily injury had not been found true. The court also imposed a life sentence for the kidnapping charge and a six-year term for the robbery charge. The court ordered that all sentences be served consecutively, bringing the total term to 75 years to life plus 22 years determinate plus life. The court also awarded credits and imposed fines.[7]

DISCUSSION

1. Consecutive sentences

Appellant claims that the trial court's reasoning for imposing consecutive sentences for the sex offenses was not supported by substantial evidence. We hold that any error was harmless.

a. Statutory framework

The categories of rape, sodomy, and sexual penetration of which appellant was convicted are each punishable by imprisonment in state prison for three, six, or eight years. (§§ 264, subd. (a), 286, subd. (c)(2)(A), 289, subd. (a)(1)(A).) If a defendant is found to have personally inflicted great bodily injury

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[7] We describe the sentencing hearing in greater detail below, after our explanation of the relevant statutory framework.

on the victim in the commission of any one of these crimes, the sentence for that crime is increased to 25 years to life. (§ 667.61, subds. (a), (c), (d)(6).)

The Penal Code dictates under what circumstances the sentences for multiple sex offenses shall be served consecutively as opposed to concurrently. If a court determines that a defendant has committed multiple enumerated sex offenses, including rape, sodomy, and sexual penetration, either against (1) separate victims or (2) the same victim on separate occasions, the court must impose full, separate, and consecutive terms for each violation of those enumerated offenses. (§ 667.6, subds. (d), (e).) A parallel provision extends this rule to sex offenses subject to the 25-years-to-life enhancement as well. (§ 667.61, subd. (i).)

When "determining whether crimes against a single victim were committed on separate occasions," courts are instructed to "consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior." (§ 667.6, subd. (d).) The duration of time between the crimes is not in and of itself determinative of the question. (*Ibid.*)

If, after conducting the above analysis, the court finds that the multiple offenses were committed against a single victim on the *same* occasion, the court has the discretion to impose a full, separate, and consecutive term for each violation, but is not required to do so.[8] (§ 667.6, subd. (c).) Should the court choose to

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[8] Courts have held that the discretion permitted under section 667.6, subdivision (c) applies to offenses subject to the 25-years-to-life enhancement, and therefore a court can impose multiple consecutive 25-years-to-life sentences for offenses

exercise its discretion and impose consecutive sentences, it must state on the record its reasons for that decision. (*People v. Black* (2007) 41 Cal.4th 799, 822 (*Black*); *People v. Irvin* (1996) 43 Cal.App.4th 1063, 1072.) The reasons need not be detailed or extensive; they "need only refer to the 'primary factor or factors' that support the decision to impose such a sentence." (*Black, supra*, at p. 822, quoting Cal. Rules of Court, rule 4.406(a).) Among other things, a court may consider "circumstances in aggravation or mitigation" when determining whether to impose consecutive sentences. (Cal. Rules of Court, rule 4.425(b).)

On appeal, we apply the substantial evidence standard when reviewing a court's determination that sex offenses against a single victim took place on separate occasions. (See *People v. Corona* (1988) 206 Cal.App.3d 13, 17 ["if the evidence supports [the trial court's finding of separate occasions], the decision to sentence under subdivision (d) must be upheld"]; *People v Plaza* (1995) 41 Cal.App.4th 377, 384 [once a trial court determines that sex offenses took place on separate occasions, an appellate court is " ' "not at liberty to overturn the result unless no reasonable trier of fact could decide that there was reasonable opportunity for reflection [by the perpetrator]" ' "]; see also *Black, supra*, at p. 818, fn. 7 ["On appellate review, a trial court's reasons for its sentencing choice are upheld if 'supported by available, appropriate, relevant evidence.' "].)

b. Proceedings below

As discussed above, in addition to convictions for robbery and kidnapping for the purpose of robbery, the jury convicted

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committed against the same victim on the same occasion. (*People v. Rodriguez* (2012) 207 Cal.App.4th 204, 214.) Appellant does not contest this view, and we accept it for purposes of this appeal.

appellant of one count each of rape, sodomy, and sexual penetration, each with a finding that appellant had inflicted great bodily injury in the commission of the offenses. The jury also convicted appellant of one additional count each of rape and sexual penetration without enhancements for great bodily injury. During the sentencing hearing the trial court concluded, and appellant does not dispute, that the jury found that the three counts subject to the great bodily injury enhancement took place before appellant bathed the victim in the shower, and the two counts not subject to the enhancement took place after.

The court then considered whether the three preshower offenses should be sentenced concurrently or consecutively as to one another, and considered the same question as to the two postshower offenses. The court stated, and the prosecution conceded, that the decision was discretionary under section 667.6, subdivision (c), rather than mandatory under subdivision (d). The court reasoned that the crime "involve[d] the same victim on relatively the same occasion."

The prosecution argued that consecutive sentences were appropriate given the "multiple beatings, over [the victim's] entire body during the course of the sexual assault."[9] The

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[9] Appellant characterizes the prosecution's argument as claiming that "the beating inflicted during the course of [the] first three sex offenses supported a finding that appellant had a reasonable opportunity to reflect upon his actions between each offense." We see no indication in the transcript, however, that the prosecution was linking the beating to appellant's opportunity for reflection. The more likely interpretation is that the prosecution was arguing that the severity of the beating was an aggravating factor supporting an imposition of consecutive terms.

defense argued that the conduct was "one very closely related series of actions," with no time for reflection, and therefore concurrent sentencing was appropriate. The defense conceded, however, that the interruption to bathe the victim "probably" provided an opportunity for reflection.

The court then sentenced appellant. It stated that the shower separated the first three sex offenses from the second two, and therefore the preshower offenses were a separate occasion from the postshower offenses, requiring consecutive sentencing.

As to whether the preshower offenses should be sentenced consecutively or concurrently as to one another, the court said it would rely on the prosecution's concession that the court had discretion to decide. The court said, "I will sentence Mr. Zulu to consecutive sentences on the three [preshower] counts, as well as the remaining two [postshower] counts."

The court stated that appellant was not eligible for probation and said, "I must sentence him to the determina[te] sentence first." The court then considered "factors in aggravation, versus the factors in mitigation," relying on California Rules of Court, rule 4.421. The court found that the crime involved great violence and bodily harm, the victim was particularly vulnerable, appellant had engaged in violent conduct indicating he was a danger to society, appellant had numerous prior convictions of increasing seriousness, and appellant had served a prior prison term. The court found no factors in mitigation.

The court stated, "Based upon the circumstances in aggravation significantly outweighing the circumstances in mitigation, I will sentence Mr. Zulu to the high term of six years" for the robbery conviction. For the postshower sex offenses, the

court stated, ". . . I, again, choose the high term [of eight years each], with the [circumstances] in aggravation outweighing the circumstances in mitigation."

The court said, "Again, I am exercising my discretion and finding that Mr. Zulu had adequate opportunity for reflection between the separate [postshower] sexual assaults, making them separate occasions, for a total of 22 years in state prison determina[te] sentencing. [¶] I am making the same finding as to the three [preshower] counts involving the great bodily injury allegation . . . ." The court then imposed three consecutive 25-year-to-life sentences for the preshower offenses, as well as a consecutive life sentence for the kidnapping conviction.

c. Analysis

Appellant concedes (as his counsel conceded during sentencing) that appellant pausing to bathe the victim, wash her clothes, wipe the cards in her wallet, and take her money and cell phones clearly provided opportunity for reflection between the preshower and postshower acts. Thus, appellant does not dispute that the trial court correctly concluded that the sentence for at least one of the postshower sex offenses must be served consecutively to the sentence for at least one of the preshower sex offenses, pursuant to section 667.6, subdivision (d), and section 667.61, subdivision (i).

Appellant instead challenges the court's discretionary decision to sentence the three preshower offenses consecutive to one another, and to do the same with the two postshower offenses—in other words, appellant challenges the court's decision to impose consecutive sentences for each of the five sex offenses. Appellant contends that the trial court erred by relying on the "separate occasions" rationale to impose these

discretionary consecutive sentences, arguing that this rationale was not supported by the record.

If indeed the court made a finding of "separate occasions" as to all five offenses, we agree it is unsupported by substantial evidence. Although "the Courts of Appeal have not required a break of any specific duration or any change in physical location" to establish that multiple sex offenses took place on separate occasions (*People v. Jones* (2001) 25 Cal.4th 98, 104), the case law suggests there must be *some* break in the sexual assault, however slight. (See, e.g., *People v. Garza* (2003) 107 Cal.App.4th 1081, 1092 [perpetrator had reasonable opportunity to reflect between sex offenses when he paused to play with the victim's chest, put his gun down, and pull the victim's legs around his shoulders]; *People v. King* (2010) 183 Cal.App.4th 1281, 1325 [perpetrator had sufficient opportunity to reflect when he paused during sexual assault to "look around uneasily" when a car passed by].)

In this case, however, there is no indication in the record of any break or interruption during either the preshower period or the postshower period. When describing the attacks, the victim listed the series of violative sex acts with no details as to any intervening actions on the part of appellant. For each period, she described the appellant inserting his fingers into her, then penetrating her vagina and anus with his penis. Although she described resisting the attacks, and appellant hitting or choking her repeatedly, it was not clear when any of this took place relative to the sex offenses; that is, it is not clear if the hitting and choking took place before, during, or after any particular offense. Without this information, it is impossible to know whether there were any pauses in the assaults, or, if there were, which offenses were separated from one another and which were

continuous. Thus, there was no basis to find that all five sex offenses constituted "separate occasions."[10]

But the record is not clear as to whether the trial court relied on a finding of "separate occasions" to impose consecutive sentences for the five sex offenses. Appellant's interpretation is certainly not implausible: for example, in deciding whether to sentence the preshower offenses consecutively, the court asked "whether there was a sufficient opportunity for reflection, which is the law." Later, the court said, "I am exercising my discretion and finding that Mr. Zulu had adequate opportunity for reflection between the separate [postshower] sexual assaults, making them separate occasions, for a total of 22 years in state prison determina[te] sentencing. [¶] I am making the same finding as to the three [preshower] counts . . . ." Comments such as these could be read to suggest the court was focused on the "separate occasions" inquiry in imposing the consecutive sentences, as appellant contends.

But the court also stated repeatedly throughout the sentencing hearing that it was making a discretionary determination pursuant to section 667.6, subdivision (c). Because in this case section 667.6, subdivision (c) would only apply in the *absence* of separate occasions, the court's invocation of that provision suggests it did *not* make a finding of separate occasions. Indeed, at the start of the discussion of consecutive sentencing,

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[10] It would not matter if the court made this finding pursuant to its discretion under section 667.6, subdivision (c) as opposed to the mandatory requirements under subdivision (d). Even a discretionary decision must be " 'supported by available, appropriate, relevant evidence.' " (*Black, supra*, 41 Cal.4th at p. 818, fn. 7.)

the court stated that section 667.6, subdivision (c) applied because the crime "involve[d] the same victim on relatively the same occasion."

Adding to the ambiguity is the fact that the record is unclear as to whether the trial court provided any reason besides "separate occasions" to justify imposition of consecutive sentences. Respondent argues that the court relied on the aggravating factors that the court listed. But the sentencing transcript is not clear on this. The court listed the aggravating factors after stating, "I must sentence him to the determina[te] sentence first," which could suggest the aggravating factors pertained to the determinate sentencing rather than the consecutive sentencing. The court also expressly stated that it was imposing the upper terms for the convictions for robbery and the two postshower sex offenses "[b]ased upon the circumstances in aggravation significantly outweighing the circumstances in mitigation." In contrast, the court never expressly linked the aggravating factors to its decision to impose consecutive sentences. Indeed, having used the aggravating factors to justify the upper terms for the two postshower sex offenses, the trial court was barred from using those same factors to justify imposition of consecutive sentences for those two offenses. (See California Rules of Court, rule 4.425 (b)(1).)[11]

We need not resolve these ambiguities, however, because even assuming the court made an error, such error was harmless.

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[11] The rule states in relevant part that "[a]ny circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except . . . [¶] . . . [a] fact used to impose the upper term . . . ." (Cal. Rules of Court, rule 4.425(b)(1).)

Remand for resentencing is unnecessary if there are sufficient facts in the record to support a consecutive sentence, and " ' "[i]t is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error." ' " (*People v. Osband* (1996) 13 Cal.4th 662, 728 (*Osband*); see *People v. Champion* (1995) 9 Cal.4th 879, 934 (*Champion*), overruled on other grounds by *People v. Combs* (2004) 34 Cal.4th 821, 860.)

In *Champion*, the trial court failed to articulate a reason for imposing consecutive sentences. (*Champion, supra*, 9 Cal.4th at p. 934.) The Supreme Court held that remand was unnecessary: given the multiple circumstances in aggravation noted by the trial court, with no factors in mitigation, it was "inconceivable that the trial court would impose a different sentence if we were to remand for resentencing." (*Ibid.*) Thus, the court held that "the trial court's failure to state reasons for imposing consecutive sentences [was] harmless." (*Ibid.*)

In *Osband*, the trial court imposed the upper term of a determinate sentence based on several aggravating factors, and then imposed a consecutive sentence based on one of those same aggravating factors, in violation of the California Rules of Court. (*Osband, supra*, 13 Cal.4th at p. 728.) The Supreme Court stated this was "error," but found that "no prejudice appears." (*Ibid.*) The court reasoned that "[o]nly a single aggravating factor is required to impose the upper term [citation], and the same is true of the choice to impose a consecutive sentence [citation]." (*Id.* at pp. 728-729.) Thus, "the court could have selected disparate facts from among those it recited to justify the imposition of both a consecutive sentence and the upper term, and on this record we discern no reasonable probability that it would not have done so." (*Id.* at p. 729.)

In this case, even were we to find the trial court erred—either by failing to state a valid reason to impose consecutive sentences, or by using the same reason to impose both the upper term and consecutive sentences—remand would be unwarranted. As in *Osband* and *Champion*, the trial court listed many factors in aggravation, and could have selected any one of them to impose the upper terms, and another to impose the consecutive sentences. Given that the trial court stated clearly its intention to exercise its discretion to impose consecutive sentences for the five sex offenses, "we discern no reasonable probability" that it would not do so again on remand. (*Osband, supra*, 13 Cal.4th at p. 729.)[12] Thus, any error on the part of the trial court in imposing consecutive sentences was harmless.

2. Section 654

Appellant contends, and respondent concedes, that the trial court should have stayed the sentence for first degree robbery pursuant to section 654. We agree.

"Section 654 bars multiple punishments for separate offenses arising out of a single occurrence where all of the offenses were incident to one objective." (*People v. Lewis* (2008) 43 Cal.4th 415, 519 (*Lewis*), rejected on other grounds by *People v. Black* (2014) 58 Cal.4th 912, 919-920.) Thus, a defendant cannot be punished for both kidnapping for the purpose of

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[12] Appellant further contends that under the Sixth and Fourteenth Amendments to the United States Constitution, any findings supporting consecutive sentences must be made by a jury rather than a judge. As appellant concedes, this argument has been rejected and foreclosed by both the United States and California Supreme Courts. (*Oregon v. Ice* (2009) 555 U.S. 160, 163-164; *People v. Scott* (2015) 61 Cal.4th 363, 405.)

robbery and robbery if both crimes were committed with the single intent and objective of robbing the victim. (*Lewis*, at p. 519.)

Here, the instruction for kidnapping for the purpose of robbery required the jury to find, among other things, that appellant, acting with the intent to commit robbery, moved O.N. a substantial distance using force or fear. The instruction for first degree robbery required a finding that appellant had committed the robbery "while the [victim] was using or had just used an ATM machine and was still near the machine." Thus, the robbery for which appellant was convicted was the taking of O.N.'s watch at the ATM machine after she had been unable to withdraw cash, and the kidnapping consisted of appellant taking O.N. to that ATM. The kidnapping and the robbery "were committed with the single intent and objective of robbing" O.N. at the ATM. (*Lewis, supra*, 43 Cal.4th at p. 519.) The robbery sentence must be stayed under section 654. (See *Lewis*, at p. 519.)

DISPOSITION

The judgment is modified to stay the six-year sentence for robbery. The trial court is directed to forward a modified abstract of judgment to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.