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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Respondent, v. CARLOS GARCIA MORALES, Defendant and Appellant.	2d Crim. No. B229240 (Super. Ct. No. 2009018334) (San Luis Obispo County)

Carlos Garcia Morales appeals his conviction by jury for sexual intercourse with a child under the age of 10 years (Pen. Code, § 288.7, subd. (a))[1] and lewd act on a child under the age of 14 (§ 288, subd. (a)) with special findings that he kidnapped the victim, substantially increasing the risk of harm to the victim. (§ 667.61, subds (a), (c)(8) & (d)(2), and Appellant was sentenced to 50 years to life state prison and ordered to have no visitation and "no contact" with the victim. (§ 1202.05.) We will modify the judgment to award 76 days conduct credit (§ 2933.1) and strike the "no contact" order. The judgment, as modified, will be affirmed.

Facts

On May 25, 2009, appellant entered the home of Nora R. and Octavio S. at 1:30 in the morning and grabbed their 20 month old baby girl. Baby Doe cried out

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

"Mama!" Nora woke up and saw appellant carrying Baby Doe out of the bedroom. Although Nora was six months pregnant, she gave chase and yelled for help. Appellant dropped his baseball cap and drove off with Baby Doe.

At 3:00 a.m., Oxnard Police Officer Matt Renshaw observed appellant driving a Mazda MX6 with broken taillights and a broken brake light. Appellant and the Mazda matched the 911 description. Officer Renshaw saw a small child in the car and made a traffic stop. Exiting the car, appellant tried to flee and was arrested.

After Nora made an in-field identification, she noticed that Baby Doe's diaper was on backwards. Blood and semen were on the diaper and pajama bottoms. DNA tests determined that the semen was appellant's and that Baby Doe's DNA was on appellant's penis and scrotum. SART Nurse Examiner Pamela Barnett observed a trickle of blood coming out of Baby Doe's vagina and reported that the posterior fourchette between the hymen and bottom of the vagina was torn. The laceration and blood was consistent with penile or digital penetration.

Waiving his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694]), appellant gave conflicting statements to the police. Appellant said that he found Baby Doe under a tree on his way back from the liquor store. Appellant put the baby in the car and was driving around looking for the baby's family when the police stopped him. Appellant denied putting his penis or finger in Baby Doe's vagina but admitted that he had a baseball cap just like the one found outside Baby Doe's house.

Appellant talked to Oxnard Police Commander Robert Cox and Detective Sharon Giles later in the day, and admitted kidnapping and sexually assaulting Baby Doe. Appellant said that he was drunk and walked into Baby Doe's house, thinking it was his house.[2] Entering the bedroom, appellant saw a man and a woman sleeping (Octavio and Nora) and a little girl. Appellant realized that he was in

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[2] Baby Doe lived on South McKinley Avenue, Oxnard, a block away from appellant's residence on North McKinley Avenue. The park was about six blocks away.

the wrong house. The sight of the woman sexually excited him but the woman was too big to carry. Appellant imagined having sex with the little girl (Baby Doe) and took the infant because she was easier to carry. Appellant claimed that "the little girl" was eight to ten years old and wearing diapers.

After appellant drove to a deserted park, he placed Baby Doe in the backseat, removed her pajama bottoms and diaper, and penetrated her vagina with his penis. Appellant stated that "just a little piece of it went in" and that he moved his penis back and forth for two or three minutes. Unable to obtain full penetration, appellant removed his penis, masturbated, and ejaculated on Baby Doe. Appellant said that he "drank enough beer . . . to be able to pretend that she was a grown woman." Appellant drew a picture of a penis to illustrate how the entire head of his penis penetrated Baby Doe's vagina.

At trial, appellant claimed that he was drunk and had no intent to hurt or sexually assault Baby Doe. Forensic evidence was received that appellant had a blood alcohol content (BAC) of .07 percent when he arrested. Based on appellant's weight and alcohol intake, a defense expert opined that appellant had a .11 or .12 BAC when Baby Doe was abducted.

Substantial Evidence: Lewd Conduct

The prosecutor told the jury that appellant "is charged with two counts. I'm going to make sure it's very clear for you. Count 1, the lewd and lascivious act. That is conduct that directly relates to him going into the bedroom, and picking up [Baby Doe], and running out of the house. . . . [¶] Count 1 also has a special allegation of kidnapping. That is him running out of the house with [Baby Doe], putting her in his car, and driving away to a park where he can be alone with [Baby Doe]." [¶] Count 2 [sexual intercourse with a child under the age of ten], that's in his car. That's in the backseat of his car where he places part of his penis into [Baby Doe's] vagina. I want to make sure we're clear which count applies to which conduct."

Appellant asserts there is no substantial evidence to support the finding that he picked up Baby Doe to obtain sexual gratification.[3] Section 288, subdivision (a) "prohibits *all* forms of sexually motivated contact with an underage child." (*People v. Martinez* (1995) 11 Cal.4th 434, 444.) "*Any* touching of a child under the age of 14 violates this section, even if the touching is outwardly innocuous and inoffensive, if it is accompanied by the *intent* to arouse or gratify the sexual desires of either the perpetrator or the victim. [Citation.]" (*People v. Lopez* (1998) 19 Cal.4th 282, 289.)

In determining whether the perpetrator touched the child with the intent to obtain sexual gratification, the trier of fact looks to all the circumstances including the charged act, the manner of the touching that occurs, any deceit used to avoid detection, and the perpetrator's extrajudicial statements. (*People v. Martinez*, *supra,* 11 Cal.4th at p. 445.) "[T]he trier of fact has always been free to consider the relationship of the parties, the nature of the touching, and the presence or absence of any nonsexual purpose under section 288." (*Id*., at p. 450, at fn. 16.)

Here, as indicated, there was sufficient evidence of criminal intent. Appellant was a stranger, entered the bedroom in the middle of the night while the family was asleep, and grabbed Baby Doe. He told the police that he was "horny," that he had an erection, and that he wanted to have sex.[4] The sight of Nora excited

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[3] The jury was instructed that sexual intent may be proved by circumstantial evidence. (CALCRIM 225.) It was instructed: "The touching need not be done in a lewd or sexual manner," but in order to convict, the prosecution had to prove: "1. The defendant willfully touched any part of a child's body either on the bare skin or through the clothing; [¶] 2. The defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself; [¶] AND [¶] 3. The child was under the age of 14 years at the time of the act." (CALCRIM 1110.)

[4] In a taped interview, appellant was asked:

"TE: But when, when you took the girl, for what reason, or why did you want to take her?

him but appellant knew could he could not carry her out of the bedroom. Appellant imagined having sex with Baby Doe, picked her up and ran.

Acting out his sexual fantasy, appellant drove Baby Doe to a deserted park, put her in the back seat, and removed her pajama bottoms and diaper to expose her vagina. Appellant said that he scraped his erect penis against Baby Doe's exposed vagina. Appellant said he could not achieve full penetration. Withdrawing his penis, appellant masturbated until he ejaculated on the infant.

Appellant contends that the touching was brief and he was too drunk to form the requisite intent to commit a lewd act. A lewd act is any touching of a child "'with the specific intent to arouse, appeal to, or gratify the sexual desires'" of either the child or the perpetrator. (*People v. Levesque* (1995) 35 Cal.App.4th 530, 545.) Appellant admitted that he was "horny" and had an erection and wanted to have sex with Baby Doe. Appellant consumed several beers but had the wherewithal to sling Baby Doe over his shoulder, run from the house, and drive Baby Doe to a deserted park where, in appellant's words, "I tried to abuse the little girl."

"CM: Well at that moment, it occurred to me. It came into my mind well to . . . , I wanted to have sex." [¶] . . . . . .

"TE: What were you feeling, what were you thinking when you saw the little girl?

"CM: Well I imagined things.

"TE: What did you imagine?

"CM: Well, having sex . [¶] . . . . .

" TE: Did you imagine that the little girl who you took was, like a woman? . . . [¶] I need for you to say, yes or no.

" CM: Yes, yes.

"TE: Yes?

"CM: Yes."

Substantial evidence supports the finding, consistent with due process, that appellant picked up and abducted Baby Doe with the intent to obtain sexual gratification. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [61 L.Ed.2d 560, 573]*; People v. Johnson* (1980) 26 Cal.3d 557, 577-578.) In the end, "it is the *jury*, not the appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.]" (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139.) Here the evidence is overwhelming.

Section 654

Appellant argues that consecutive 25-year-to-life sentences violate section 654 because the offenses were committed with the same criminal intent and objective. Section 654 however "does *not* bar multiple punishment simply because numerous sex offenses are rapidly committed against a victim with the 'sole' aim or achieving sexual gratification." (*People v. Harrison* (1989) 48 Cal.3d 321, 325.) "[M]ultiple sex acts committed on a single occasion can result in multiple statutory violations. Such offenses are generally 'divisible' from one another under section 654, and separate punishment is usually allowed. [Citations.]" (*People v. Scott* (1994) 9 Cal.4th 331, 344, fn. 6.)

Assuming that appellant had but one objective – sexual gratification – section 654 does not apply unless the lewd act was either incidental or the means by which another crime was accomplished. (*People v. Alcarez* (2009) 178 Cal.App.4th 999, 1006.) "[S]ection 654 does not apply to sexual misconduct that is 'preparatory' in the general sense that is designed to sexually arouse the perpetrator . . . . [Citation.] That makes section 654 of limited utility to defendants who commit multiple sex crimes against a single victim on a single occasion. . . . If the rule were otherwise, 'the clever molester could violate his victim in numerous and lewd ways, safe in the knowledge that he could not be convicted and punished for every act.' [Citation.] Particularly with regard to underage victims, it is inconceivable the Legislature would have intended this result. [Citation.]" (*Ibid.*)

Appellant argues that the act of picking up Baby Doe was preparatory to the act of sexual intercourse. Appellant, however, had an erection, was sexually excited and "began to imagine things" when he grabbed Baby Doe and ran to his car. The inference is that appellant would have attempted to have sex in the bedroom but for the presence of Baby Doe's parents. It spawned a new and second criminal intent: kidnap the baby and take here to a remote location, which was the basis for the true finding on the kidnapping enhancement. (CALCRIM 3175; §§ 667.61, subds. (a) & (d)(2).) The act of abducting Baby Doe and driving her to a vacant park was not necessary or incidental to the unlawful sexual intercourse.

We reject the argument that the trial court erred in imposing consecutive 25-year-to-life sentences. The evidence clearly shows that appellant had the opportunity to reflect between offenses and each successive offense created a new risk of harm. (See e.g., *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1255.) Appellant "'should . . . not be rewarded where, instead of taking advantage of an opportunity to walk away from the victim, he voluntarily resumed his sexually assaultive behavior. . . . [T]he nature and sequence of the sexual 'penetrations' or offenses defendant commits is irrelevant for section 654 purposes. Whether defendant ends a break in the activity by renewing the same sex act [as argued by appellant] or by switching to a new one [citation], the result under section 654 is the same." (*People v. Harrison, supra,* 48 Cal.3d at p. 338.)

No Contact Order

At sentencing, the trial court ordered, "[p]ursuant to [section] 1202.05, [that] the defendant shall have no visitation [with Baby Doe] . . . and will have no contact. That [no] contact order includes in person, by mail, by telephone directly or indirectly."

Section 1202.05, subdivision (a) provides that when a defendant is sentenced to state prison for violation of certain sex offenses such as section 288, "and the victim of one or more those offenses is a child under the age of 18 years, the court shall prohibit all visitation between the defendant and the child victim."

Appellant argues, and the Attorney General agrees, that the "no contact" is an unauthorized sentence and must be stricken.[5] (See generally, *People v. Scott, supra,* 9 Cal.4th at p. 354; *People v. Lara* (1984) 155 Cal.App.3d 570, 574 [sentencing court has no discretion to deviate from punishment prescribed by statute].) Section 1202.05 authorizes orders precluding visitation, not contact. We conclude that the "no contact" order must be stricken as beyond the trial court's authority.

Conduct Credits

The trial court awarded 511 days actual custody credit but no conduct credit. Appellant argues and the Attorney General concedes, that appellant is entitled to conduct credit for 15 percent of the actual time served in presentence custody. (§ 2933.1.)

Section 2933.1, subdivision (a) limits conduct credits to 15 percent where, as here, the defendant is convicted of a violent felony within the meaning of section 667.5, subdivision (c). (See e.g., *People v. Caceres* (1997) 52 Cal.App.4th 106, 110 [15 percent conduct credit for lewd conduct conviction] .) Appellant served 511 actual days[6] and should be awarded 76 days conduct credit. The calculation is based on "the greatest whole number of days which does not 'exceed 15[.00] percent of the actual period of confinement. . . .' (§ 2933.1, subd. (c).)" (*People v. Ramos* (1996) 50 Cal.App.4th 810, 816.)

Conclusion

The superior court clerk is directed to amend the October 7, 2010 sentencing minute order and abstract of judgment to: (1) strike the "no contact" order, and (2) to reflect that appellant was awarded 511 days actual custody credit plus 76 days conduct credit, for a total of 587 days. The superior court clerk is further

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[5] Baby Doe or her family can request that a no-contact order be imposed as a condition of parole. (§ 3053.2, subd. (a); 3053.6, subds. (a)–(c).)

[6] Appellant was arrested May 15, 2009 and sentenced October 7, 2010 which totals 511 days actual custody.

directed to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. The sentence remains the same: 50 years to life state prison. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

David W. Long, Judge

Superior Court County of Ventura

Derek K. Kowata, 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, Senior Assistant Attorney General, Roberta L, Davis, Analee J Brodie, Deputy Attorneys General, for Plaintiff and Respondent.