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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

THE PEOPLE, Plaintiff and Respondent, v. RAFAEL SKATE DIOSDADO, Defendant and Appellant.	B191934 (Los Angeles County Super. Ct. No. BA266915)

APPEAL from a judgment of the Superior Court of Los Angeles County, Sam Ohta, Judge. Modified and, as modified, affirmed with directions.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and Roberta L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

Rafael Skate Diosdado appeals from the judgment entered following his plea of no contest to count 1 – possession of a firearm by a felon, and following his convictions by jury on count 4 – kidnapping to commit rape (Pen. Code, § 209, subd. (b)(1)) with personal use of a firearm (Pen. Code, § 12022.53, subd. (b)), count 5 – sexual penetration by a foreign object (Pen. Code, § 289, subd. (a)(1)), count 6 – attempted forcible rape (Pen. Code, §§ 664, 261, subd. (a)(2)), and count 7 – forcible rape (Pen. Code, § 261, subd. (a)(2)), with findings as to each of counts 5, 6, and 7, that appellant personally used a firearm (Pen. Code, §§ 12022.3, subd. (a), 12022.53, subd. (b)) and findings as to each of counts 5 and 7, that appellant committed aggravated kidnapping (Pen. Code, § 667.61, subds. (a) & (d)(2)), kidnapped (Pen. Code, § 667.61, subds. (a) & (e)(1)), and personally used a firearm (Pen. Code, § 667.61, subds. (a) & (e)(4)); and count 8 – criminal threats (Pen. Code, § 422) with an admission that he suffered a prior felony conviction (Pen. Code, § 667, subd. (d)). The court sentenced appellant to prison for a total unstayed term of 48 years, plus 50 years to life. Appellant and respondent claim the trial court committed sentencing errors. We modify the judgment and, as modified, affirm it with directions.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence, the sufficiency of which is undisputed, established that about midnight on May 29, 2004, Jessica E. was driving a person home. Appellant, who was a felon, and Augustine Garcia[1] were also in the car.

Sometime after Jessica E. dropped the person home, appellant, using a gun, and with Garcia as his accomplice, kidnapped her to rape her by forcing her to drive down various streets. Appellant later made Jessica E. stop the car and get in the backseat with Garcia. Appellant gave the gun to Garcia and began driving. While appellant was driving, Garcia committed sexual offenses against Jessica E.

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1 Garcia was at one point a codefendant. He is not a party to this appeal.

Appellant later stopped the car and got in the backseat with Jessica E. Garcia got in the front seat. Appellant began taking off Jessica E.'s pants and digitally penetrated her vagina.

Appellant pulled Jessica E.'s pants down further and made her turn around so she was facing the back. Jessica E.'s knees were on the backseat and her hands were on top of the backseat. Appellant tried to rape Jessica E. (count 6), and his penis touched her vagina a few times. Jessica E. testified, "I guess there was a weird angle or something and he couldn't do it from that way." She also testified, "I guess he was trying to get it in there. It just wasn't working." Appellant turned Jessica E. around so she was facing him, then raped her (count 7). Garcia later committed another sexual offense against her. During and after the above sexual offenses, appellant made criminal threats to Jessica E.

CONTENTIONS

Appellant claims (1) Penal Code section 654 bars multiple punishment on counts 6 and 7, (2) the trial court abused its discretion by denying his motion to dismiss a strike, (3) the trial court erred by staying instead of striking the Penal Code section 12022.3, subdivision (a) enhancements, (4) appellant is entitled to additional precommitment credit, and (5) the trial court committed *Cunningham*[2] error by imposing consecutive sentences on counts 5, 6, and 7. Respondent claims the abstract of judgment must be amended to reflect that the trial court imposed a Penal Code section 12022.53, subdivision (b) enhancement as to count 5 and that there was no such enhancement as to count 1.

DISCUSSION

1. *Penal Code Section 654 Did Not Bar Multiple Punishment on Counts 6 and 7.*

Penal Code section 654 provides, in relevant part, that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

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[2] *Cunningham v. California* (2007) 549 U.S. ___ [166 L.Ed.2d 856].

In *People v. Perez* (1979) 23 Cal.3d 545 (*Perez*), the defendant committed various sexual offenses and the People urged on appeal that the trial court erred by concluding that Penal Code section 654 banned multiple punishment as to some of the offenses. (*Id*. at pp. 549-550.) The Supreme Court observed, ". . . it is well settled that section 654 applies not only where there was but one act in the ordinary sense, but also where there was a course of conduct which violated more than one statute but nevertheless constituted an indivisible transaction. [Citation.] Whether a course of conduct is indivisible depends upon the intent and objective of the actor. [Citation.] If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Id*. at p. 551.)

Perez also observed, "[o]n the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for the independent violations committed in pursuit of each objective even though the violations were parts of an otherwise indivisible course of conduct. [Fn. omitted.]" (*Perez, supra,* 23 Cal.3d at p. 551.)

The Supreme Court noted that "[a] defendant who attempts to achieve sexual gratification by committing a number of base criminal acts on his victim is substantially more culpable than a defendant who commits only one such act." (*Perez, supra,* 23 Cal.3d at p. 553.) As to the offenses committed by the defendant in *Perez*, the Supreme Court stated, "[n]one of the sex offenses was committed as a means of committing any other, none facilitated commission of any other, and none was incidental to the commission of any other. We therefore conclude that section 654 does not preclude punishment for each of the sex offenses committed by defendant." (*Id*. at pp. 553-554.)

Appellant's completed rape of Jessica E. followed his attempt to rape her; therefore, the rape was not a means of committing, did not facilitate the commission of, and was not incidental to, the preceding attempted rape.

Moreover, appellant initially sought sexual gratification by attempting to rape Jessica E. from behind. Once this proved unsuccessful, he finally stopped, having committed

attempted rape. Once he finally stopped, he no longer sought sexual gratification that way. Instead, he turned the unwilling Jessica E. around and placed her in a different physical position to expose her to a factually different outrage for his sexual gratification, namely, raping her while facing her. The attempted rape from behind was not the means by which appellant committed the completed frontal rape, did not facilitate commission of the latter offense, and was not incidental to it. Penal Code section 654 did not bar multiple punishment on counts 6 and 7. (Cf. *People v. Harrison* (1989) 48 Cal.3d 321, 338; *Perez, supra*, 23 Cal.3d at pp. 548-554; *People v. Brown* (1994) 28 Cal.App.4th 591, 601.)[3]

2. *The Trial Court Did Not Err by Refusing to Strike Appellant's Prior Felony Conviction.*

a. *Pertinent Facts.*

The preconviction probation report prepared for a December 2004 hearing reflects as follows. Appellant was born in 1976. In October 1994, he was convicted of unauthorized taking of a vehicle and placed on probation for three years. In 1995, he was convicted of grand theft from the person (case No. GA023272) and sentenced to prison for six years eight months.

The report also indicates as follows. Appellant was a 28-year-old gang member. Despite efforts of the criminal justice system to change his criminal behavior, he continued violating the law. Appellant was placed on probation, reoffended, was placed on parole, and reoffended. The report listed as an aggravating circumstance that appellant had served a prior prison term, indicated there were no mitigating circumstances, and recommended imprisonment for the "mid-base" term.

Prior to trial, on May 16, 2005, the court and parties discussed the status of plea negotiations. The court indicated its understanding that the People had made offers to appellant and Garcia, and both defendants had rejected the offers. The court observed that sentences in sex cases were "astronomically high." Appellant's counsel indicated that if

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3 To the extent appellant suggests multiple punishment on counts 6 and 7 violated his right to due process, his suggestion is perfunctory and there is no need to address it. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214, fn. 11; *People v. Callegri* (1984) 154 Cal.App.3d 856, 865.)

appellant were convicted he would die in prison. Garcia's counsel indicated that if Garcia were convicted he would serve 43 years 8 months in prison. The court indicated the People were offering appellant 38 years 8 months in prison and offering Garcia 20 years in prison. The court gave appellant and Garcia an opportunity to talk with their respective counsel.

Later, counsel for each defendant spoke with the assistant head deputy district attorney for the sex crimes unit. The assistant offered 20 years in prison to appellant and 15 years in prison to Garcia. Counsel for appellant and Garcia advised the two that this was the best offer they would receive. Appellant and Garcia rejected the offers on the grounds that appellant and Garcia were innocent. Appellant's counsel indicated that appellant had not rejected the People's offer because of the proposed prison time appellant would have been required to serve pursuant to the People's offer.

Prior to trial, on May 19, 2005, appellant admitted that he had suffered a strike, namely, a 1995 robbery (case No. GA023272). During trial, the court declared a mistrial as to Garcia. Following appellant's conviction in the present case, the People, in October 2005, filed a sentencing memorandum asking the court to sentence appellant to prison for 116 years to life.

On April 13, 2006, appellant filed a request that the court dismiss the strike. The written motion urged as follows. The strike was over 10 years old. During that 10-year period, appellant was free from criminal contacts. He had suffered no new arrests or convictions after he was placed on parole. His maximum sentence was 116 years to life in prison if the strike were not stricken, but the court should strike it and sentence him to prison for 35 years to life. In May 2006, the People filed another sentencing memorandum urging the court to sentence appellant to prison for 116 years to life.

At the June 9, 2006 sentencing hearing, the court indicated it had reviewed the court file, read the parties' sentencing memoranda, and read appellant's request to strike the strike. Appellant argued his maximum sentence was 106 (not 116) years to life in prison, but the trial court should strike the strike and sentence him to prison for 35 years to life. Appellant's counsel claimed that, at least in appellant's counsel's presence, appellant had

accepted the People's offer. Appellant's counsel also claimed that appellant ultimately was unable to accept the offer because it was part of a package plea bargain with Garcia, and Garcia had refused the offer. According to appellant's counsel, the People later offered Garcia 15 years in prison and he accepted the offer.

After extensive discussions concerning appellant's possible prison sentences and their component parts, the court turned to the issue of appellant's request to strike the strike. The court acknowledged it had discretion to strike the strike, then stated, "In doing so, *People v. Williams* cites guidance on how the court ought to apply this discretion." The court indicated it had to consider the circumstances of the current offense, the circumstances of the past conviction, and the background, character, and prospects of appellant as they related to recidivism and legislative intent.

The court indicated as follows. Appellant suffered current convictions for two violent sex offenses, kidnapping to commit a violent sexual offense, possession of a firearm by a felon, attempted rape, and the serious felony of criminal threats. All of the current offenses, except possession of a firearm by a felon, were related to violence. The court stated the current offenses were "clearly within the bull's-eye of the legislative intent."

As to appellant's past convictions, the court noted that even if appellant's robbery conviction was a strong-arm robbery, it was a serious and violent felony, and did not present a circumstance outside the legislative intent of the Three Strikes law.

As to appellant's background, character, and prospects, the court indicated as follows. Appellant did not have excessively numerous contacts with law enforcement, but did have significant contacts, including the present case. Appellant was initially on probation, was later imprisoned for the robbery conviction, was released on parole, and the present offenses occurred. Appellant had a previous significant contact with law enforcement, his imprisonment should have taught him something, but he committed the current offenses which showed a great deal about appellant and what he was capable of doing. These facts were related to recidivism and the legislative intent of the Three Strikes law.

The court stated, "So from that perspective I can't say that [appellant's] background, character and prospect . . . goes well for him. And because of this analysis, the only one that I could say possibly favors him is the 1995 robbery conviction. That's the only one where I could say it might slide to the outer periphery of the legislative intent. That being so, I do not believe I have discretion here that could rationally be utilized to strike the strike. And so, respectfully, I deny the defendant's motion to strike the strike in this case." The court sentenced appellant to prison for 48 years, plus 50 years to life.

b. *Analysis*.

Appellant claims the trial court erroneously refused to strike, pursuant to Penal Code section 1385, appellant's strike. We disagree. The court reviewed the court file, the parties' sentencing memoranda, and appellant's request to strike the strike, and the court heard argument from counsel. In light of the nature and circumstances of appellant's current offenses and the strike, and the particulars of his background, character, and prospects, appellant cannot be deemed outside the spirit of the Three Strikes law as to the strike, and may not be treated as though he previously had not suffered it. (Cf. *People v. Williams* (1998) 17 Cal.4th 148, 161-164.)

Appellant argues the trial court erred because the trial court did not consider the length of appellant's potential sentence absent the striking of the strike. However, the record, including appellant's references to his potentially lengthy sentence in his written request to strike the strike, his references thereto during argument at the June 9, 2006 sentencing hearing, and the comments of the court and parties at that hearing, reflect otherwise. Appellant also claims the length of his sentence was particularly unfair because he tried to accept the People's plea offer but was forced to go to trial because the offer was part of a package offer which Garcia refused. The record belies the claim. We hold that the trial court's order refusing to strike the strike was sound, and not an abuse of discretion.

(Cf. *People v. Williams*, *supra*, 17 Cal.4th at pp. 158-164; *People v. DeGuzman* (1996) 49 Cal.App.4th 1049, 1054-1055; *People v. Askey* (1996) 49 Cal.App.4th 381, 389.)[4]

3. *The Trial Court Erroneously Failed to Strike the Penal Code Section 12022.3, Subdivision (a) Enhancements*.

As to each of counts 5, 6, and 7, the jury found true a Penal Code section 12022.53, subdivision (b) firearm use allegation, and a Penal Code section 12022.3, subdivision (a) firearm use allegation. At sentencing on June 9, 2006, the court, as to each of counts 5, 6, and 7, (1) imposed a 10-year Penal Code section 12022.53, subdivision (b) enhancement, (2) imposed a four-year Penal Code section 12022.3, subdivision (a) enhancement, but (3) stayed execution of sentence on the Penal Code section 12022.3, subdivision (a) enhancement pending completion of appellant's sentence on the Penal Code section 12022.53, subdivision (b) enhancement.

Appellant claims the trial court erred by failing to strike the Penal Code section 12022.3, subdivision (a) enhancement pertaining to each of counts 5, 6, and 7. We agree. Penal Code section 12022.53, subdivision (f), provides, in relevant part: "An enhancement involving a firearm specified in Section . . . 12022.3, . . . *shall not be imposed* on a person in addition to an enhancement imposed pursuant to this section." (Italics added.) As to each of counts 5, 6, and 7, the trial court imposed a Penal Code section 12022.53, subdivision (b) enhancement with the result that an "enhancement [was] imposed pursuant to this section" within the meaning of Penal Code section 12022.53, subdivision (f). Therefore, the trial court was required to comply with the mandate of Penal Code section 12022.53, subdivision (f), that a Penal Code section 12022.3 enhancement "shall not be imposed." Accordingly, the court was required to strike each such Penal Code section 12022.3, subdivision (a) enhancement. (Cf. *People v. Sun* (2007) 157 Cal.App.4th 277, 283-285 (*Sun*); *People v.*

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[4] To the extent appellant claims his sentence violated due process and constituted cruel and unusual punishment, he waived the issues by failing to raise them below (cf. *People v. Benson* (1990) 52 Cal.3d 754, 786, fn. 7), we reject the claims because he has raised them perfunctorily, and, in any event, there is no merit to them. (Cf. *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1631.)

Bracamonte (2003) 106 Cal.App.4th 704, 712, fn. 5.) None of the cases cited by respondent compels a contrary conclusion. Respondent's argument based on California Rules of Court, rule 4.447,[5] was rejected in *Sun*.[6]

4. *Appellant Is Entitled to Additional Precommitment Credit.*

Appellant was arrested on June 17, 2004, and remained in custody until he was sentenced on June 9, 2006, a total of 723 days, inclusive. At sentencing, the court awarded appellant 807 days of precommitment credit, consisting of 702 days of custody credit and, pursuant to Penal Code section 2933.1, subdivision (a), 105 days of conduct credit.

However, appellant was entitled to a total of 831 days of precommitment credit, consisting of 723 days of custody credit and 108 days of conduct credit. (Cf. *People v. Bravo* (1990) 219 Cal.App.3d 729, 731; *People v. Smith* (1989) 211 Cal.App.3d 523, 527.) We reject any claim by respondent, based on Penal Code section 1237.1, contrary to our above conclusion, since appellant's contention concerning precommitment credit is not his sole contention on appeal. (*People v. Sylvester* (1997) 58 Cal.App.4th 1493, 1496, fn. 3; *People v. Acosta* (1996) 48 Cal.App.4th 411, 420-428.)

5. *No Cunningham Error Occurred.*

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5 The rule stated, "No finding of an enhancement shall be stricken or dismissed because imposition of the term is either prohibited by law or exceeds limitations on the imposition of multiple enhancements. The sentencing judge *shall impose* sentence for the aggregate term of imprisonment computed without reference to those prohibitions and limitations, and shall thereupon stay execution of so much of the term as is prohibited or exceeds the applicable limit. The stay shall become permanent upon the defendant's service of the portion of the sentence not stayed." (Italics added.)

6 In the face of the conflict between the "shall not be imposed" language of Penal Code section 12022.53, subdivision (f) and the "shall impose" language of the rule, the statutory language prevails. "Rules promulgated by the Judicial Council may not conflict with governing statutes. [Citation.] If a rule is inconsistent with a statute, the statute controls. [Citation.]" (*Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 532.) The related issue of the appropriate disposition of concurrent findings under Penal Code section 12022.53, subdivision (b), and Penal Code section 12022.5, is pending before our Supreme Court in *People v. Gonzalez*, review granted March 14, 2007, S149898.

Appellant's prison sentence included a term of 50 years to life on count 5, a consecutive term of 6 years on count 6, and a consecutive term of 12 years on count 7, plus, as to each such count, 10 years for a Penal Code section 12022.53, subdivision (b) enhancement. The court imposed the consecutive sentence on count 6 pursuant to Penal Code section 1170.1, and the consecutive sentence on count 7 pursuant to Penal Code section 667.6, subdivision (c).

Appellant claims imposition of consecutive sentences as to counts 5, 6, and 7 constituted error under *Cunningham v. California*, *supra*, 549 U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856]. We disagree. In *People v. Black* (2007) 41 Cal.4th 799 (*Black*), our Supreme Court noted that "[t]he high court's decision in *Cunningham* does not call into question the conclusion we previously reached regarding consecutive sentences. The determination whether two or more sentences should be served in this manner is a 'sentencing decision[] made by the judge after the jury has made the factual findings necessary to subject the defendant to the statutory maximum sentence on each offense' and does not 'implicate[] the defendant's right to a jury trial on facts that are the functional equivalent of elements of an offense.' [Citation.] Accordingly, we . . . conclude that [a] defendant's constitutional right to jury trial [is] not violated by the trial court's imposition of consecutive sentences . . . ." (*Black*, *supra*, 41 Cal.4th at p. 823.) Appellant concedes this Court is bound by *Black*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

6. *The Abstract of Judgment Must Be Corrected*.

As mentioned, the trial court imposed a 10-year Penal Code section 12022.53, subdivision (b) enhancement as to count 5. However, the abstract of judgment erroneously fails to reflect this. Moreover, there was no such enhancement alleged, admitted, or found true as to count 1, but the abstract of judgment erroneously reflects the trial court stayed such an enhancement as to that count. We will direct the trial court to correct the abstract of judgment accordingly. (Cf. *People v. Humiston* (1993) 20 Cal.App.4th 460, 466.)

DISPOSITION

The judgment is modified by striking the three Penal Code section 12022.3, subdivision (a) enhancements pertaining to each of counts 5, 6, and 7, and by awarding appellant an additional 21 days of custody credit pursuant to Penal Code section 2900.5, subdivision (a), plus 3 days of conduct credit pursuant to Penal Code section 2933.1, subdivision (a), for a total precommitment credit award of 831 days, and, as modified, the judgment is affirmed. The trial court is directed to forward to the Department of Corrections an amended abstract of judgment reflecting the above modifications, that a Penal Code section 12022.53, subdivision (b) enhancement was imposed as to count 5, and that there was no Penal Code section 12022.53, subdivision (b) enhancement, imposed, stayed, or otherwise, as to count 1.

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KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.