

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JAIME JUAREZ GARCIA,

Defendant and Appellant.

2d Crim. No. B190881
(Super. Ct. No. 2005010499)
(Ventura County)

OPINION ON REHEARING

Jaime Juarez Garcia appeals a judgment after jury trial, following his conviction of making criminal threats (Pen. Code, § 422),¹ corporal injury to a child's parent (§ 273.5, subd. (a)), forcible oral copulation (§ 288a, subd. (c)(2)), sexual battery by restraint (§ 243.4, subd. (a)), and forcible rape (§ 261, subd. (a)(2)). The court imposed an aggregate state prison term of 24 years and 8 months, which included an upper term sentence of 8 years for the forcible oral copulation count, and the upper term of 8 years for the forcible rape count. The court ruled that those sentences run consecutively.

¹ All statutory references are to Penal Code.

We conclude the trial court did not err by imposing consecutive sentences for Garcia's convictions of forcible oral copulation and forcible rape, but it exceeded its jurisdiction by imposing the upper term for the rape conviction by relying on sentencing factors which were not tried by a jury. We vacate the sentence and remand for resentencing, but otherwise affirm.

FACTS

Garcia went to the home of his former wife, Maricela G. He hit her with a stick and told her he was going to kill her because she "was a whore." He demanded to go inside her home. He told her that if she did not let him in, he would take her children away.

He grabbed her and they entered the house together. Garcia told Maricela that "he wanted to sleep with [her] and that he owns [her]."

They walked into the bedroom and he told her to "get undressed." She complied because Garcia yelled at her and threatened to take her child away. He put his knees on her legs and "kissed" her vagina. After he finished that activity, he kissed her breast, and then the other breast. He then kissed her mouth and neck. Maricela testified that he also "was touching [her] all over [her] body" He ignored her requests that he stop. While he was kissing her breasts, he moved his legs so they were in between hers. He then "put his penis in [her] vagina."

DISCUSSION

I. *Consecutive Sentences*

Garcia contends the court erred by imposing consecutive sentences for forcible oral copulation and forcible rape because "the offenses did not occur on separate occasions." We disagree.

Where a defendant is convicted of forcible oral copulation and forcible rape, the court must impose consecutive sentences for those offenses if the crimes "involve the same victim on separate occasions." (§ 667.6, subd. (d); *People v. Garza*

(2003) 107 Cal.App.4th 1081, 1091.) "*In determining whether crimes against a single victim were committed on separate occasions . . . , 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 . . . determinative on the issue of whether the crimes in question occurred on separate occasions.*" [Citations.]" (*Garza, supra*, at p. 1091.)

"[A] forcible violent sexual assault made up of varied types of sex acts committed over time against a victim, is not necessarily one sexual encounter. . . . [A] trial court could find a defendant had a 'reasonable opportunity to reflect upon his . . . actions' even though the parties never changed physical locations and the parties 'merely' changed positions." (*People v. Irvin* (1996) 43 Cal.App.4th 1063, 1071.) It may find multiple sex offenses committed on separate occasions even where there was no "obvious break in the perpetrator's behavior" (*People v. Jones* (2001) 25 Cal.4th 98, 104.) Where the trial judge finds that the defendant committed the 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" the first sex offense. (*People v. Garza, supra*, 107 Cal.App.4th at p. 1092.)

Here the trial court found Garcia committed these offenses "on separate occasions which means [he] had the opportunity to reflect and, nevertheless, resumed his sexually assaultive behavior." In so finding, the court did not abuse its discretion.

In *Garza*, the defendant inserted his finger in the victim's vagina, he then played with her chest, placed his gun in the back seat, "pulled the victim's legs around his shoulders and . . . forced his penis inside her vagina." (*People v. Garza, supra*, 107 Cal.App.4th at pp. 1092-1093.) The Court of Appeal held that he had an "adequate

opportunity for reflection" between the time he committed the offenses of digital penetration and forcible rape. (*Id.* at p. 1093.)

The present case is analogous to *Garza*. When Garcia committed forcible oral copulation, his knees were on Maricela's legs. Before he forcibly raped her, he committed other sexual acts, including kissing her breasts, mouth and neck, and touching her all over her body. She repeatedly asked him to stop, but he continued. While Garcia was kissing her breasts, he changed his body position so that his legs were in between her legs. He then committed the forcible rape. From this evidence, the trial court could reasonably infer that he had a reasonable opportunity to reflect after committing oral copulation and before committing rape. (*People v. Garza, supra*, 107 Cal.App. 4th 1093.)

Garcia contends that this case is analogous to *People v. Pena* (1992) 7 Cal.App.4th 1294, 1316, where the Court of Appeal held that a defendant who committed rape and oral copulation did not have a reasonable opportunity to reflect upon his actions. But in that case, the defendant raped the victim and then "simply flipped [her] over and orally copulated her." (*Ibid.*) The two offenses occurred in rapid succession within "a matter of seconds" of each other. (*Ibid.*) Here, by contrast, there was an interval between the two offenses when Garcia committed a calculated series of other sexual offenses which gave him time to reflect before committing rape. The trial court did not err by imposing consecutive sentences. (*People v. Jones, supra*, 25 Cal.4th at p. 104; *People v. Irvin, supra*, 43 Cal.App.4th at p. 1071.)

II. Upper Term Sentences

Garcia contends the trial court erred by imposing upper term sentences by making findings on aggravating sentencing factors which were not tried by a jury. We agree. The United States Supreme Court has held that a judge may not impose an upper term sentence because the aggravating sentencing factors to support such a sentence must be tried by a jury. (*Cunningham v. California* (2007) 549 U. S. ___ [127 S.Ct 856].)

The Attorney General claims that the upper term sentences should be sustained. He argues that Garcia is a recidivist and a trial court may find that to be a factor in aggravation to support an upper term without submitting the matter to a jury.

That may be the case, but here the court found that there were multiple factors in aggravation upon which it relied in imposing the upper terms aside from Garcia's criminal record. It noted that there were seven factors listed in the probation report, but it then said, "in my view there are many more which are not listed." It relied heavily on factors such as Maricela's vulnerability, Garcia's use of fear "to obtain compliance of the victim," the threat he poses to society, and his attitude that Maricela "still belongs to him." It said, "I know there's no factor that says the defendant is a nightmare, but there probably should be." Under these circumstances we must vacate the upper term sentences and remand for resentencing.

The upper term sentences are vacated and we remand the matter for resentencing. (*Cunningham v. California, supra*, 549 U. S. __ [127 S.Ct 856].) In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

Allan L. Steele, Judge
Superior Court County of Ventura

Gilbert W. Lentz, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Bill Lockyer, Attorneys General, Dane R. Gillette, Mary Jo Graves, Chief Assistant Attorneys General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lawrence M. Daniels, Supervising Deputy Attorney General, Kathy S. Pomerantz, Susan Sullivan Pithey, Deputy Attorneys General, for Plaintiff and Respondent.