Filed 2/10/05

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. EDILBERTO SAPHAO, Defendant and Appellant.	A103716 (Solano County Super. Ct. No. 201751)

Appellant Edilberto Saphao appeals from his convictions of rape, penetration with a foreign object, and assault with a firearm. We affirm, concluding in the published portion of this opinion that: (1) there was no legal error in the trial court's determination that the sex offenses did not occur on a "single occasion" under Penal Code section 667.61[1]; (2) the imposition of two separate sentences pursuant to section 667.61 was error because the trial court's, rather than the jury's, factual finding that the offenses did not occur on a "single occasion" resulted in an increase in Saphao's sentences, and therefore, violated *Blakely v. Washington* (2004) __U.S. __, [124 S.Ct. 2531] (*Blakely*); (3) such *Blakely* error was harmless beyond a reasonable doubt; (4) the court did not err in ordering the separate sentences to be served consecutively pursuant to section 667.6, rather than under section 667.61; and, (5) the court's imposition of consecutive sentences upon a finding that the offenses occurred on "separate occasions" under section 667.6 was supported by substantial evidence and did not violate *Blakely*.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part III.D.

1 Unless otherwise noted, all further statutory references are to the Penal Code.

In the unpublished portion of this opinion we reject Saphao's additional arguments that the firearm enhancement was inadequately pled, and that there was insufficient evidence that he used a firearm, thereby requiring that both the conviction for assault with a firearm and the enhancements for firearm use be invalidated.

I.

PROCEDURAL BACKGROUND

Saphao was charged by amended information with sexual penetration with a foreign object (count 1) (§ 289, subd. (a)(1)), forcible rape (count 2) (§ 261, subd. (a)(2)), assault with a firearm (§ 245, subd. (a)(2)), and two counts of assault with a stun gun (counts 3 & 4) (§ 244.5, subd. (b)). The information also alleged that Saphao used a dangerous or deadly weapon or firearm and tied or bound the victim in committing counts 1 and 2 (§ 667.61, subds. (e)(2), (e)(4) & (e)(6)). The information further alleged that Saphao used a firearm in the commission of the sex offenses (§§ 12022.5, subd. (a)(1), & 12022.53, subd. (b)).

The trial court dismissed the two counts of assault with a stun gun based on insufficient evidence. A jury found Saphao guilty of the remaining counts and found the enhancing allegations true. At sentencing, the trial court found that the two sexual offenses committed by Saphao did not occur on a "single occasion" under section 667.61, subdivision (g). The court sentenced him to a prison term of 25 years to life for each sex offense, to run consecutively. This timely appeal followed.

II.

FACTUAL BACKGROUND

I.F.[2], a 20-year-old college student, lived with her mother and stepfather, Edilberto Saphao. On August 22, 2002, at about 1:30 p.m., she was home alone taking a shower. After her shower, she went to her bedroom and dressed. As she left her bedroom, a man

[2] Contrary to the suggestion of Saphao's counsel, we omit the full name of a living victim of a sex crime despite the fact that she has attained the age of majority. (See Cal. Style Manual (4th ed. 2000) Editorial Policies Followed in Official Reports, § 5.9, pp. 179-180.)

wearing a ski mask jumped out of an adjacent room and grabbed her. I.F. struggled with the man, who used a stun gun to repeatedly sting her neck, arm and leg. He also carried a small black gun that I.F. "wasn't sure . . . was a real gun or not," but which appeared to be a handgun. I.F. described the man as being about five feet, nine inches tall, 150 to 160 pounds, and having brown eyes. He wore a dark knit ski mask with eyeholes, and a dark blue uniform shirt. The shirt had a patch on the shoulder with the word "cadet" in gold.

The man handcuffed I.F.'s hands behind her back and put duct tape over her mouth and eyes. He pushed I.F. onto the bed in the guest room, where he touched her vagina over her underwear. I.F. heard the man leave the room and open drawers in her bedroom. He returned and inserted his fingers in I.F.'s vagina while she was still on the bed.

The man then went downstairs and out the back door of the house. I.F. knew he went into the backyard because the home had a doorbell chime that sounded when the door to the backyard was opened. He returned and bound I.F.'s ankles with straps, one to a chair and one to another object. At some point after the man returned from the backyard, she felt him put something cold against her temple and she heard a click. I.F. thought it was a gun. The man pulled up I.F.'s dress and sucked her right breast. I.F. felt something limp brush against her vagina. Then, the man "thrusted once," and she felt something penetrate her vagina. At the time, she was not sure if the man penetrated her with his penis, but later realized he did.

I.F. heard the man go down the stairs and exit her home. She then heard the door open and Saphao entered the house. She sat up and removed the tape from her eyes and mouth and the strap from her left ankle, and called 911. The 911 tape was played for the jury. Saphao's voice can be heard in the background of that telephone conversation.

Police arrived while I.F. was still on the telephone with the 911 operator. Saphao was in the front room with I.F., who was still handcuffed. Police officer Becky Campbell testified that I.F. had six red marks equidistant apart that were consistent with stun gun injuries. After removing I.F.'s handcuffs with bolt cutters, police transported her to North Bay Medical Center for a sexual assault exam.

Saphao remained at the home while Detective Joel Orr and other officers conducted their investigation. Detective Orr asked him to sign a consent form to search the house and two vehicles police observed in the driveway, which Saphao did. Police found a third vehicle during their search of the garage, which Saphao stated was his. Saphao consented to a search of the vehicle, and unlocked it for police. Inside, police found a "Fairfield Police Department[-] type shirt with our patches and cadet rockers above them." They also found an officer's badge, a stocking mask with holes cut in it, a black belt, gloves, a sexual device, a stun gun, and a revolver with two rounds of ammunition.

Detective Orr interviewed I.F. at the hospital. She told him that she believed her assailant was her stepfather based on "the way he breathed, the way he smelled, his height, his build, the color of his skin [and] his mannerisms." I.F. revealed that her stepfather had molested her for years as a child, only stopping when she was 13 years old and yelled "no" loudly in front of her mother.

Registered nurse Judy Herriman conducted a sexual assault examination of both I.F. and Saphao. The examination of I.F. revealed scratches and bruises, red marks consistent with stun gun injuries, vaginal bruising and bleeding, a torn hymen and a foreign pubic hair. Nurse Herriman took swabs from I.F.'s breasts, which revealed saliva consistent with Saphao's genetic profile. She also took swabs from Saphao's penis and scrotum, which contained blood consistent with I.F.'s genetic profile.

Tanya Vermeulen, a senior criminalist with the California Department of Justice, performed the genetic testing of the material on the swabs. She testified that the genetic profile of the DNA found in the saliva taken from I.F.'s breast was found in approximately one in 620 billion African Americans, one in 720 billion Caucasians, and one in 1.4 trillion Hispanics. The genetic profile found in the blood swab taken from Saphao's penis and scrotum is found in approximately one in 12 trillion African Americans, one in 9.9 trillion Caucasians, and one in 3 trillion Hispanics.

III.

DISCUSSION

A. Imposition of Two 25-Years-to-Life Sentences Under Section 667.61

Saphao contends that the trial court erred in imposing two 25-years-to-life sentences pursuant to section 667.61. Section 667.61 mandates a sentence of 15 or 25 years to life when a defendant is convicted of certain sex offenses committed under enumerated aggravating circumstances. (§ 667.61, subds. (c) & (e).) The aggravating circumstances must be "alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact." (§ 667.61, subd. (i).) Multiple sentences under section 667.61 are imposed under certain conditions. Section 667.61 provides in that regard as follows: "The term specified . . . shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion. . . ." (§ 667.61, subd. (g).) This provision "may only be reasonably interpreted as providing separate terms for offenses committed on each single occasion." (*People v. Jackson* (1998) 66 Cal.App.4th 182, 193.)

Saphao argues that the court erred in finding that the sexual offenses did not occur during a "single occasion" because it "misapplied" the test set forth in *People v. Jones* (2001) 25 Cal.4th 98 (*Jones*). In *Jones*, the defendant was convicted of forcible rape, three counts of forcible sodomy and forcible oral copulation. (*Id*. at p. 102.) All five sex crimes were committed in the backseat of an automobile over an estimated hour and a half time period. (*Id*. at p. 101.) The three sodomy offenses took place over a period of approximately one hour. (*Ibid*.)

The court analyzed the meaning of "single occasion" under subdivision (g) of section 667.61, contrasting it with the "separate occasion" language of section 667.6. (*Jones*, *supra*, 25 Cal.4th at p. 105.) The *Jones* court explained that section 667.6 "mandates full, separate and consecutive sentences for certain sex offenses 'if the crimes involve separate victims or involve the same victim on separate occasions . . . ." (*Jones*, *supra*, 25 Cal.4th at p. 104.) Section 667.6 instructs the trial court on making that

determination: "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 or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative . . . ." (§ 667.6, subd. (d); *id*. at p. 104.) Section 667.61, in contrast, provides no guidance in determining whether the offenses were committed on a "single occasion."

Jones concluded that, while the "phrases 'separate occasion' [§ 667.6] and 'single occasion' [§ 667.61] are similar, . . . they are not identical." (*Jones*, *supra*, 25 Cal.4th at p. 105.) Consequently, the court held that "for the purposes of Penal Code section 667.61, subdivision (g), sex offenses occurred on a 'single occasion' if they were committed in close temporal and spatial proximity." (*Id.* at p. 107.) The court concluded that "the rule we adopt should result in a single life sentence, rather than three consecutive life sentences, for a sequence of sexual assaults by defendant against one victim that occurred during an uninterrupted time frame and in a single location." (*Ibid.*, italics omitted.)

Saphao asserts that the offenses here occurred in close temporal proximity, because by his calculation, the two offenses took place within 53 minutes of each other, and *Jones* "inform[s] us that sexual acts occurring within an hour and a half may safely be considered to be in 'close temporal proximity.' " *Jones*, however, did not define any minimum period of time constituting close temporal proximity. Instead, *Jones* considered the circumstances of that case, including that the sexual offenses all occurred in the backseat of the same automobile and were committed during an "uninterrupted time frame," as well as considering the length of the time period in which the offenses occurred. (*Jones*, *supra*, 25 Cal.4th at p. 107.) *Jones* made no pronouncement of a bright-line test defining close temporal proximity as anything less than an hour and a half.

Saphao also claims that *Jones* used the "uninterrupted time frame" language as an example only. The court in *Jones* stated: "[I]n this matter, for example, the rule we adopt should result in a single life sentence, rather than three consecutive life sentences, for a sequence of sexual assaults by defendant against one victim that occurred during an uninterrupted time frame and in a single location." (*Jones*, *supra*, 25 Cal.3th at p. 107, italics omitted.) "For example" refers to the single life sentence the court imposed as a result of applying the rule it enunciated, not to the uninterrupted time frame. (*Ibid.*) Moreover, even if an "uninterrupted time frame" is only an example of close temporal proximity, it does not logically lead to Saphao's conclusion that an hour and a half time frame, interrupted by the defendant leaving the residence and later returning, must also constitute "close temporal proximity."

We likewise reject the suggestion of Saphao's counsel at oral argument that the intent of the defendant or the expectations of the victim play a part in determining whether the sexual offenses occurred in "close temporal and spatial proximity." (*Jones*, *supra*, 25 Cal.4th at p. 107.) The court in *Jones* defined "single occasion" without regard to subjective factors involving either the perpetrator or the victim. We find no error in the trial court's application of the test set forth in *Jones*.

B. Imposition of Consecutive Sentences

At the outset, we must clarify the law by which consecutive sentences are imposed for specified sexual offenses, such as those at issue here. Saphao argues that section 667.61 controls not only the decision whether to impose separate 25-years-to-life terms for the convictions, but if imposed, whether they should be served concurrently or consecutively. Both Saphao's argument and the Attorney General's response, however, blur the distinction between what are actually two separate sentencing decisions. The first is a decision, under section 667.61, to impose a second 25-years-to-life term for Saphao's conviction of a second sexual offense—forcible rape. If two 25-years-to-life sentences are imposed, then the sentencing court must make another, separate decision under section 667.6, whether to impose the sentences concurrently or consecutively. Saphao assumes that both decisions to impose separate sentences and to order them

served consecutively are governed by the provision in 667.61, requiring a finding that the crimes did not occur on a "single occasion." Section 667.61, however, is silent as to consecutive sentencing. The Attorney General, while addressing the issue as framed by Saphao, nevertheless concedes that "section 667.61(g) does not mandate consecutive terms . . . ."

As we have discussed in the preceding section, when a defendant has been convicted of two or more sexual offenses enumerated in section 667.61, one sentence of 15 or 25-years-to-life may only be imposed "once for any offense or offenses committed against a single victim during a single occasion." (§ 667.61, subds. (g) & (i).) The determination under section 667.61, subdivision (g) that multiple offenses were not committed on a "single occasion" is required before a second sentence under that section "shall be imposed." However, if multiple sentences have been imposed, the court determines whether the sentences should run concurrently or consecutively under section 667.6, utilizing the "separate occasion" test. (§ 667.6, subd. (d), see *People v. Jackson*, *supra*, 66 Cal.App.4th at pp. 191-192 [section 667.6 applies to indeterminate terms imposed under section 667.61]; *People v. Murphy* (1998) 65 Cal.App.4th 35, 39-43.)

The "separate occasion" standard for determining whether consecutive sentences should be imposed under section 667.6 has been held to be both different and more expansive than the "single occasion" standard under section 667.61. Section 667.6 instructs the court 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).) "Under the broad standard established by Penal Code section 667.6, subdivision (d), the Courts of Appeal have not required a break of any specific duration or any change in physical location." (*Jones*, *supra*, 25 Cal.4th at p. 104.)

People v. Garza (2003) 107 Cal.App.4th 1081 is illustrative. There, the court found the trial court could reasonably have decided that the counts of forcible oral copulation, rape, and forcible digital penetration occurred on separate occasions where the "defendant forced the victim to orally copulate him, [then] let go of her neck, ordered

her to strip, punched her in the eye, put his gun to her head and threatened to shoot her, and stripped along with her. . . . [¶] [He then] inserted his finger in the victim's vagina[;] . . . began to play with the victim's chest; . . . put his gun on the back seat; . . . pulled the victim's legs around his shoulders and, finally, . . . forced his penis inside her vagina. A reasonable trier of fact could have found the defendant had adequate opportunity for reflection between these sex acts and that the acts therefore occurred on separate occasions for purposes of application of section 667.6, subdivision (d). [Citation.]" (*Id.* at p. 1092.)

Saphao concedes that the sexual offenses were committed on separate occasions as defined in section 667.6 because he "seemed to have sufficient time to 'reflect upon his behavior.' " We agree. Consequently, there was no error in the trial court's imposition of consecutive sentences.

C. Sentencing Issues Under *Blakely*

Saphao next argues that his sentence was constitutionally invalid under *Blakely v. Washington*, *supra*, ___ U.S. ___, 124 S.Ct. 2531 (*Blakely*) and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), because the court, rather than the jury, determined that the two sex offenses were not committed on a "single occasion." (§ 667.61, subd (g).) He also maintains that, to the extent the "separate occasion" test under section 667.6 is applicable to impose consecutive sentences, *Blakely* also requires a jury to make this predicate finding before consecutive sentences can be imposed. The Attorney General maintains that *Blakely* does not apply to consecutive sentencing under any statutory scheme in general, or under section 667.61 in particular.[3]

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[3] We recently rejected the same arguments, premised on the same authorities, in an opinion in which the California Supreme Court has granted review. (*People v. Butler* (2004) 122 Cal.App.4th 910, 918-919, review granted Dec. 15, 2004, S129000.) Pending final word from the California Supreme Court, we see no reason either to depart from that holding here, or to reiterate its reasoning. The issue regarding the application of Blakely to an aggravated term under California's determinate sentencing law is also currently pending before the California Supreme in *People v. Towne*, review granted July 14, 2004, S125677, and *People v. Black*, review granted July 28, 2004, S126182.

In *Blakely*, the United States Supreme Court held that a Washington State court denied a criminal defendant his constitutional right to a jury trial by increasing the defendant's sentence for second-degree kidnapping from the "standard range" of 49 to 53 months to 90 months based upon the trial court's finding that the defendant acted with "deliberate cruelty." (*Blakely*, *supra*, 124 S.Ct. at p. 2537.) The *Blakely* court found that the state court violated the rule previously announced in *Apprendi*, *supra*, 530 U.S. at p. 490, that " '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' " (*Blakely*, *supra*, 124 S.Ct. at p. 2536.)

1. Imposition of Two Separate Sentences Under Section 667.61

As previously discussed, under section 667.61, at least a single sentence of 25-years-to-life is mandated if the defendant is convicted of a crime identified in that section, under enumerated aggravating circumstances. (§ 667.61, subd. (a).) Saphao's conviction for count one, sexual penetration with a foreign object (§ 289, subd. (a)(1)), is subject to this increased sentence both because it is identified as a crime subject to the increased penalty (§ 667.61, subd. (c)(5)), and because it was committed both while he used a firearm (§ 667.61, subd. (e)(4), and while he "engaged in tying or binding of the victim." (§ 667.61, subd. (e)(6).) Imposition of this first 25-years-to-life sentence under section 667.61 does not run afoul of *Blakely* because the findings necessary to invoke the section's increased penalty were all found by the jury. (§ 667.61, subd. (i).)

The middle term for forcible rape, the second offense for which Saphao was convicted, is normally six years. (§ 264, subd. (a) (sentence range for violation of section 261 is 3, 6 or 8 years).) But, because forcible rape is also an enumerated crime under section 667.61, and it, too, was committed with the personal use of a firearm and while Saphao tied or bound I.F., that section requires a second 25-years-to-life sentence be imposed so long as the offenses were not committed on a "single occasion." Accordingly, if the additional finding is made that the offenses were not committed on a "single occasion," that finding results in an increased term of 15 or 25-years-to-life sentence for a second offense that would otherwise have a lesser maximum punishment.

While the jury made the necessary threshold findings that Saphao's conviction for forcible rape could qualify for a second increased sentence (the jury found the offense itself was committed, as well as the firearm and "tying and binding" enhancements were found true), the jury did not make the further necessary determination as to whether both crimes were, or were not, committed on a "single occasion." As a result, the trial court's imposition of a second 25-years-to-life sentence does violates *Blakely*'s mandate that any "fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Blakely*, *supra*, 124 S.Ct. at p. 2536.)

Having determined that imposition of multiple sentences under section 667.61 requires a factual determination that must be made by a jury under *Blakely*, we now consider whether the failure to do so was prejudicial. Because the *Blakely* court based its holding on *Apprendi*, we apply the standard of prejudice applicable to *Apprendi* errors, which is the "*Chapman* test."[4] (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.)

In considering whether the two sexual assaults occurred on a "single occasion" under section 667.61, the jury rather than the court should have applied the test set forth in *Jones*: were the offenses "committed in close temporal and spatial proximity," or put another way, did they "occu[r] during an uninterrupted time frame and in a single location." (*Jones*, *supra*, 25 Cal.4th at p. 107.) As we discussed in the preceding sections, here, in contrast to *Jones*, the two sexual offenses were separated temporally. After Saphao committed the first sexual assault, the evidence showed that he left the victim's house. The victim testified that she knew he left the house because her home had a doorbell chime that sounded when the door to the backyard was opened. Saphao returned an unspecified time later, bound each of the victim's ankles to a different object, and then committed the second sexual assault. While Saphao committed the offenses in the same location, there is no question that he did not commit them "during an uninterrupted time frame." (*Ibid.*)

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[4] *Chapman v. California* (1967) 386 U.S. 18.

Jones does not discuss the meaning of "uninterrupted time frame," and no published cases have considered the meaning of "single occasion" in the circumstances presented here. Nevertheless, we conclude that where an assailant exits the building in which the victim remains after the assailant has accomplished a sexual assault, then reenters the building and commences another sexual assault, the time frame has been interrupted and the offenses were not committed on a "single occasion." It is beyond a reasonable doubt that a jury, had it considered the issue, would have made the same determination.

2. Consecutive Sentencing Under Section 667.6

The question of whether *Blakely* requires a jury to make the "separate occasion" determination necessary to impose consecutive sentences under section 667.6 is a separate issue. Saphao argues that imposing consecutive sentences involves a factual determination that "increases the penalty for a crime beyond the prescribed statutory maximum." (*Blakely*, *supra*, 124 S.Ct. at p. 2536.) The Attorney General urges that *Blakely* applies only to the sentence on a single count, not the aggregate sentence, relying on language in *Blakely* that it was concerned with the finding of a fact "that increases the penalty for *a* crime beyond the statutory maximum." (*Blakely*, *supra*, 124 S.Ct. at p. 2536, italics added.)

Courts that have considered the applicability of *Blakely* to consecutive sentencing schemes have uniformly found that it does not impact a sentencing court's imposition of a full consecutive sentence. (See *People v. Palacios* (2005) ___ Cal.App.4th ___; 2005 WL 236821.) The issue is now before the California Supreme Court.[5] Moreover, the court in *People v. Groves* (2003) 107 Cal.App.4th 1227 considered whether consecutive sentences based on the court's determination that the offenses were committed on "separate occasions" violated the mandate of *Apprendi*, *supra*, 530 U.S. 466. The court

[5] This issue is currently before the California Supreme Court, which has granted review in *People v. Vaughn* (S129050), *People v. Black* (S126182), *People v. Vonner* (S127824), *People v. Ochoa* (S128417) and others.

held that *Apprendi* did not require a jury to make that determination, "[i]f the specific fact at issue is not an element of the crime but is a factor that comes into play only after the defendant has been found guilty of the charges beyond a reasonable doubt and no increase in sentence beyond the statutory maximum for the offense established by the jury is implicated . . . . [Citations.]" (*People v. Groves, supra,* 107 Cal.App.4th at pp. 1230-1231.)

Even if *Blakely* were to apply to the trial court's determinations regarding whether consecutive sentences should be imposed under section 667.6, we find that any error in this regard was harmless beyond a reasonable doubt. As we have already discussed, the "separate occasion" standard for determining whether consecutive sentences should be imposed under section 667.6 is both different and more expansive than the "single occasion" standard under section 667.61. The "broad standard established by Penal Code section 667.6, subdivision (d), [requires no] break of any specific duration or any change in physical location." (*Jones, supra,* 25 Cal.4th at p. 104.) Moreover, as we previously indicated, Saphao conceded that the sexual offenses were committed on separate occasions as defined in section 667.6 because he "seemed to have sufficient time to 'reflect upon his behavior.' " It is beyond a reasonable doubt that a jury, if required to, would have found the sexual assaults occurred on separate occasions.

D. Allegations and Evidence of Firearm Use

Saphao's numerous claims regarding the insufficiency of the pleading and evidence regarding his use of a dangerous or deadly weapon or firearm can be reduced to two basic premises. First, he claims that the prosecution improperly "attempt[ed] to include the stun gun as part of its dangerous weapon allegation," and there was insufficient evidence that a stun gun qualifies as a dangerous weapon. Second, aside from the stun gun, there is insufficient evidence of his use of a firearm because I.F. testified that she saw him with a gun that she "wasn't sure . . . was a real gun or not." He argues that this impacts both his conviction of assault with a firearm and his sentencing

under section 667.61, the "One Strike" law, based on the jury's findings on the personal use of a firearm allegations in counts 1 and 2.[6]

Saphao first contends that the allegation of personal use of a firearm was inadequately pled in the information because it did not allege that a stun gun was a dangerous or deadly weapon. Section 667.61 requires that "[f]or the penalties provided in this section to apply, the existence of any fact required under subdivision (d) or (e) shall be alleged in the accusatory pleading . . . ." (§ 667.61, subd. (i).)

In *People v. Mancebo* (2002) 27 Cal.4th 735, the court considered the meaning of that pleading requirement. It held that "[w]e simply find that the express pleading requirements of section 667.61, subdivisions (f) and (i), read together, require that an information afford a One Strike defendant fair notice of the qualifying statutory circumstance or circumstances that are being pled, proved, and invoked in support of One Strike sentencing. Adequate notice can be conveyed by a reference to the description of the qualifying circumstance (e.g., kidnapping, tying or binding, gun use) in conjunction with a reference to section 667.61 or, more specifically, 667.61, subdivision (e), or by reference to its specific numerical designation under subdivision (e), or some combination thereof. We do not purport to choose among them." (*Id*. at pp. 753-754.) Here, the information followed the mandate of *People v. Mancebo*. It alleged as to counts 1 and 2 that "within the meaning of Penal Code sections 667.61(a), (b) and (e)(2)(4) and (6), as to defendant, as to counts 1 and 2, that the following circumstances apply: during the commission of a burglary in violation of section 459, personally used a dangerous or deadly weapon or firearm . . . [and] engaged in the tying or binding of the victim." *Mancebo* does not require that the type of weapon be alleged in the accusatory pleading. Consequently, the allegations under section 667.61, subdivision (e) were adequately pled.

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6 Section 667.61, subdivision (a) provides, in part, that a defendant convicted of specified sex offenses "shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 25 years" if the jury finds *two* or more of the circumstances specified in subdivision (e).

Next, Saphao claims error because the jury could have found the arming enhancement true based on a finding that he was armed with a stun gun, and there was insufficient evidence that a stun gun qualified as a "deadly weapon" or "firearm" under section 667.61, subdivision (e)(4)). His argument rests on the prosecutor's comments at the hearing on his motion for a new trial that "defendant was certainly on notice that the jury could find either one, a firearm or the stun gun, to be a dangerous or deadly weapon." The prosecutor's statements in argument to the court after trial do not demonstrate error. Whatever comments were made after trial, at trial itself the prosecutor relied solely on Saphao's use of a firearm to support the special circumstance of section 667.61, subdivision (e).

In closing argument, the prosecutor argued only that the firearm use supported the allegations under section 667.61, subdivision (e)(4). "[Y]ou are going to have an allegation that either a dangerous or deadly weapon or a firearm was used in this case . . . . And the Court is going to give you the definition of a dangerous or deadly weapon, and that a firearm includes a handgun. And basically what the People have to show in order to show the enhancement is that the defendant personally used the gun, and that what he did was he displayed it in a menacing manner. [¶] And I submit to you that he actually did that twice during the assault. . . . The first time was when he actually came at [I.F.]. She testified that the defendant or that her assailant had the handgun in his hand. . . . [¶] In addition to that, you have the fact that he held the gun to her temple. Okay. Yet, again, him using and displaying the gun in a threatening manner. I submit to you that holding a gun to somebody's temple is extremely threatening. It's extremely menacing. And she knew that he was holding a gun to her temple. She couldn't see, but she heard it and she felt it and she had seen it in his hand previously."

Moreover, the jury specifically found that Saphao used a firearm in the commission of both counts 1 and 2. As to both counts, the jury found true the following: "In the commission of [forcible rape and sexual penetration with a foreign object] . . . the defendant personally used a firearm, to wit, a handgun." They made additional findings that he used a dangerous or deadly weapon in committing both offenses.

Saphao's final argument in this regard is that no substantial evidence supported the jury's findings because I.F. did not testify that she thought the gun was real. The evidence, however, established the following. I.F saw Saphao carrying a small black gun, which I.F. "wasn't sure . . . was a real gun or not," but appeared to be a handgun. After Saphao put tape over her eyes and bound her legs, she felt him put something cold against her temple and she heard a click. I.F. thought it was a gun. After police arrived, they searched a vehicle which Saphao said was his. Inside, they found items consistent with I.F.'s description of those used by her assailant in committing the crimes. Those items included a "Fairfield Police Department[-]type shirt with our patches and cadet rockers above them," an officer's badge, a stocking mask with holes cut in it, a stun gun, and a revolver with two rounds of ammunition. This is certainly substantial evidence on which the jury could base their finding of firearm use. I.F.'s apparent unfamiliarity with firearms does not render the evidence of Saphao's use of a firearm insufficient.

IV.

DISPOSITION

The judgment is affirmed.

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Ruvolo, J.

We concur:

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Kline, P.J.

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Lambden, J.

Trial Court:	Solano County Superior Court
Trial Judge:	Hon. Harry S. Kinnicutt
Counsel for Appellant:	David D. Martin, Under the Assisted Case Assignment of the First District Appellate Project
Counsel for Respondent:	Bill Lockyer Attorney General of the State of California Robert R. Anderson Chief Assistant Attorney General Gerald A. Engler Senior Assistant Attorney General Christina Vom Saal Deputy Attorney General