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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CLEMENTE JONATHAN VASQUEZ, Defendant and Appellant.	B181422 (Los Angeles County Super. Ct. No. VA084547)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael A. Cowell, Judge. Affirmed.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Jaime L. Fuster and Beverly K. Falk, Deputy Attorneys General, for Plaintiff and Respondent.

Clemente Vasquez appeals after a jury convicted him of first degree burglary (Pen. Code, § 459; count 1),[1] attempted forcible rape (§§ 664/261, subd. (a)(2); count 2) and assault with intent to commit rape (§ 220; count 3). All three offenses were violent felonies (§ 667.5, subd. (c)), and the offenses in counts 2 and 3, serious felonies (§ 1192.7, subd. (c)). Appellant was sentenced to a total prison term of seven years four months, consisting of the upper term of six years for the burglary and one year four months for the assault, with the sentence on the attempted rape stayed (§ 654) and a concurrent term of one year four months imposed for a prior conviction of lewd conduct (§ 314, subd. 1).

Contrary to appellant's contention, his conviction of assault with intent to commit rape is not a lesser included offense of attempted forcible rape. It is not a lesser included offense because the potential punishment for the crime is greater, not lesser, than the potential punishment for attempted forcible rape. Also without merit is the argument that the trial court erred at sentencing in not staying imposition of the sentence for the assault conviction. As there were two occupants and victims of the burglary in addition to the victim of the assault, multiple punishments are permitted under section 654.

FACTS

On August 15, 2004, appellant and Arleen R. were neighbors living in adjacent duplex units in Bellflower. Arleen lived in the rear duplex with her son and her daughter-in-law Irene. Arleen's 12-year-old granddaughter Heather was visiting. Arleen, Irene and Heather were all acquainted with appellant, who lived in the front duplex with his mother. Sally, another neighbor, lived in a house behind the duplex and also knew appellant.

Early in the morning of August 15, Sally and a girlfriend were packing some things in Sally's house when appellant knocked on the door. Sally told him they were

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[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

busy and to go away. He knocked on the door a second time, and again they told him they were busy. But appellant stood outside and watched the women, insisting that he wanted to come in. He said he was going to take the air conditioner out and come in through the window. Sally laughed and told appellant to leave, and he eventually did leave.

Later that morning at approximately 5:00 a.m., Arleen was asleep in her bed when she thought she was having a vivid dream. She felt as if she were being kissed and awoke to find a person, who she subsequently realized was appellant, with his mouth over hers. As appellant attempted to pin down Arleen's arms and legs, she thrashed about. Appellant got his right hand over her mouth and told her to relax. Arleen kept squirming and struggling until she managed to wrap her legs together. When appellant declared, "I want sex," she replied, "You'll have to kill me."

When appellant tried to pull off Arleen's underpants and his hand was no longer over her mouth, she yelled for Irene. At that time, Irene was in the living room nursing her newborn baby and Heather was asleep on the couch in the same room. Irene heard Arleen's voice, which sounded like someone was choking her. Irene woke up Heather, put her baby down, turned on the hallway light and kicked open the door to Arleen's bedroom. Heather followed behind Irene.

Irene saw appellant on top of Arleen and immediately recognized him. Irene called appellant by name, threatened to shoot him and screamed at him. Heather also saw and recognized appellant. Irene told Heather to call the police. Appellant fled through the window which Arleen had left open, but with the screen in place.

Thereafter, the bedroom window screen was found bent and on the ground. A fingerprint lifted from the screen matched one of appellant's fingerprints.

At trial, appellant presented no evidence in his defense.

DISCUSSION

I. Appellant was properly convicted of both attempted forcible rape and assault with intent to commit a felony.

Appellant contends he was improperly convicted of both attempted forcible rape (count 2) and assault with intent to commit rape (count 3). Appellant urges that assault with intent to commit rape is a lesser included offense of attempted forcible rape, that one cannot be convicted of both the greater and lesser included offense, and that his conviction of the lesser included offense in count 3 must be reversed and the sentence vacated. However, the crime of assault with intent to commit rape is not a lesser included offense because the statutory punishment is greater than that for attempted rape.

General principles applicable to multiple crimes and lesser included offenses

Generally, the conviction of multiple crimes arising from the same act is proper. "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, . . . [and] the defendant may be convicted of any number of the offenses charged." (§ 954.) Nonetheless, this statutory mandate is subject to the well-recognized exception that multiple convictions based on a greater offense and a lesser included offense may not stand--though the Supreme Court has acknowledged that the reason for this exception prohibiting multiple convictions "'is unclear.'" (*People v. Ortega* (1998) 19 Cal.4th 686, 692, citing *People v. Pearson* (1986) 42 Cal.3d 351, 355.)

"For purposes of the rule proscribing multiple conviction, '"[u]nder California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser."' (*People v. Breverman* (1998) 19 Cal.4th 142, 154, fn. 5.)" (*People v. Sanchez* (2001) 24 Cal.4th 983, 988.)

The Supreme Court in *People v. Ortega*, *supra*, 19 Cal.4th 686, specifically rejected the technique of examining the evidence presented at trial for determining

whether one offense was a lesser included offense of another when applying the rule proscribing multiple convictions, concluding that the analysis must focus "upon the statutory definitions of both offenses and the language of the accusatory pleading. [Citations.]" (*Id*. at p. 698.) The court cited the practical reason that "[b]asing the determination of whether an offense is necessarily included within another offense solely upon the elements of the offenses and the language of the accusatory pleading promotes consistency in application of the rule precluding multiple convictions of necessarily included offenses, and eases the burden on both the trial courts and the reviewing courts in applying that rule." (*Ibid*.)

Thus, the Supreme Court has clearly established the applicability of both the elements of the offenses and the accusatory pleading tests in determining the propriety of multiple convictions. (Accord, *People v. Belmares* (2003) 106 Cal.App.4th 19, 23; *People v. Strohman* (2000) 84 Cal.App.4th 1313, 1316 [using both tests to determine whether one offense is a lesser included offense of another].) When a lesser included offense is found under either test, "the conviction of [the greater] offense is controlling, and the conviction of the lesser offense must be reversed." (*People v. Moran* (1970) 1 Cal.3d 755, 763.)

There is, however, also a certain previously unstated but necessary prerequisite in the application of either test for lesser included offenses that we now find necessary to state. For the purposes of the rule proscribing multiple convictions, a necessary prerequisite is that the offense scrutinized as an included offense must be, in fact, an offense that is lesser in terms of potential punishment than the other offense to which it is compared. Otherwise, courts could confer upon defendants the beneficial anomaly of precluding conviction of the crime with the *greater* sentence.

Since the legal justification for ignoring the explicit language in section 954 and prohibiting conviction of both the lesser and greater offenses "'is unclear'" (*People v. Ortega*, *supra,* 19 Cal.4th at p. 692), a deviant alteration of existing case law to permit reversal of the offense with the greater sentence would be particularly unwarranted. Also, comparing the potential ranges of punishment for the two offenses is appropriate,

as it is an objective, easily determined factor that helps ensure consistency in evaluating a lesser included offense claim. Thus, not only must there be a situation "'"such that the greater cannot be committed without also committing the lesser"'" (*People v. Sanchez, supra,* 24 Cal.4th at p. 988), but the purported lesser offense must also qualify as a lesser offense by having a lesser potential punishment than the other offense to which it is compared.

Application of lesser included offense principles to the present case

Here, the information charged appellant in count 2 with committing the crime of attempted forcible rape in violation of sections 664/261, subdivision (a)(2), in that he "unlawfully attempted to have and accomplish an act of sexual intercourse with a person, to wit, Arleen R., not his/her spouse, against said person's will, by means of force, violence, duress, menace and fear of immediate and unlawful bodily injury on said person [of] another."[2] The information charged appellant in count 3 with committing the crime of assault with intent to commit a felony in violation of section 220 in that he "did unlawfully assault Arleen R., with the intent to commit rape, sodomy, oral copulation and a violation of sections 264.1 [rape or penetration of genital or anal openings by foreign object, etc.], 288 [lewd or lascivious acts] and 289 [forcible acts of sexual penetration]."[3]

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[2] Section 261, subdivision (a)(2) defines rape as "an act of sexual intercourse accomplished with a person not the spouse of the perpetrator . . . [w]here it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person of another."

Section 664 provides, in pertinent part, that "[e]very person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished" with the statutorily specified prison term which is less than that proscribed for the completed offense.

[3] Section 240 defines "assault" as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."

Section 220 prescribes criminal punishment for a "person who assaults another with intent to commit mayhem, rape, sodomy, oral copulation, or any violation of Section 264.1, 288 or 289 . . . ."

The jury instruction given narrowed the focus of count 3 by instructing on assault with the intent to commit only the crime of rape.

As previously indicated, whether an offense is a lesser included offense of another is determined either by the statutory elements of the offenses or the language of the accusatory pleading (*People v. Sanchez, supra,* 24 Cal.4th at p. 988), and not by the evidence produced at trial (*People v. Ortega, supra,* 19 Cal.4th at p. 698). Under the statutory elements test, we find that although assault with intent to commit rape is a lesser included offense of forcible rape (*In re Jose M.* (1994) 21 Cal.App.4th 1470, 1476-1477; *People v. Kimball* (1953) 122 Cal.App.2d 211, 214-215), it is not a lesser included offense of *attempted* forcible rape. The reason is that it is hypothetically possible to commit an attempted forcible rape without an assault. For example, a hidden assailant could make "an unequivocal expression of an intention" (*In re Smith* (1970) 3 Cal.3d 192, 200) to forcibly rape an unsuspecting woman, but be interrupted and apprehended before springing upon the intended victim. In such a situation, the assailant could be convicted of the attempted rape, having advanced beyond mere preparation, but without having committed an assault. There would be no assault because the interruption and apprehension of the assailant precluded his "present ability" (*People v. Rocha* (1971) 3 Cal.3d 893, 899) to attempt to commit violent injury. (Cf. *People v. Marshall* (1997) 15 Cal.4th 1, 38-39 [battery, which requires an unauthorized touching of the victim, is not a lesser included offense of attempted rape, as the victim could manage to escape without having been touched].)

Under the second test, the language of the accusatory pleading test, we come to a different conclusion. As distinguished from the theoretical elements of the offense test, the facts alleged in the accusatory pleading describe this attempt as perpetrated by means of an assault. Specifically, that appellant "did unlawfully assault" the victim "with the intent to commit rape." Unlike the previously hypothesized scenario in the elements of the offense test, the language of the accusatory pleading described in conclusory terms an assault. And this assault was necessarily included in the attempted rape "by means of force [or] violence," as alleged in the information.

Respondent points out that the language in count 3 of the information alleging assault with intent to commit a felony specified not only rape as the felony, but also several other sex offenses, such as sodomy and oral copulation. Respondent thus urges that if the assault were committed with the intent to commit any of the specified sex offenses other than rape, the assault could not be a lesser included offense of attempted rape.

However, where a statute enumerates several acts disjunctively which together or separately constitute a criminal offense, such as section 220 defining assault with intent to commit any one of several specified felonies, the offense is properly and necessarily charged in the conjunctive. And although charged in the conjunctive, the commission of any one of the specified acts is sufficient to establish the necessary element of the offense. (*In re Bushman* (1970) 1 Cal.3d 767, 775; *People v. Fritz* (1970) 11 Cal.App.3d 523, 526.) As so charged here, the offense of attempted forcible rape thus includes the offense of assault with intent to commit rape.

Indeed, our Supreme Court has observed, in the context of a challenge to the predicate felony in a felony-murder case, that "an assault with intent to commit rape is merely an aggravated form of an attempted rape, the latter differing from the former only in that an assault need not be shown. [Citation.] 'An "assault" with intent to commit a crime necessarily embraces an "attempt" to commit said crime . . . .' [Citation.]" (*People v. Rupp* (1953) 41 Cal.2d 371, 382; see also *People v. Ghent* (1987) 43 Cal.3d 739, 757 [reiterating language in *Rupp* finding no error in failure to instruct on assault as a lesser included offense because evidence showed no crime other than a killing in an attempt to perpetrate rape].) Here, as framed by the allegations in the information, the attempted forcible rape factually embraces and includes the assault with intent to commit rape, which cannot be committed without also committing attempted forcible rape.

Nonetheless, although as pled in the information the attempted forcible rape cannot be committed without also committing the assault, the latter is not a lesser included offense for the purposes of the rule proscribing multiple convictions. It fails the

fundamental prerequisite that the included offense also be a lesser offense in terms of potential punishment.

Assault with intent to rape cannot be a lesser offense of attempted rape because the potential punishment for the assault is greater. The range of prison terms for assault with intent to rape is two years, four years, or six years. (§ 220.) The range of prison terms for rape is three years, six years, or eight years; for attempted rape it is half that, or 18 months, three years, or four years. (§§ 664, subd. (a) & 264, subd. (a).) Thus, even deeming assault with intent to rape as "included" in the offense of attempted rape as pled in the information, the assault is not a "lesser" offense, as revealed by the potential punishments for the two offenses.

People v. Ramirez (1969) 2 Cal.App.3d 345 addressed a somewhat similar situation. In *Ramirez*, the court deemed the punishment for assault with intent to commit rape to be greater than the punishment for attempted rape under the Determinate Sentencing Act then in effect. (*Id.* at p. 354.) The court observed: "To us it seems logical to say that where an assault is involved in an attempted rape, the act is one made subject to different punishment by two different code sections. [¶] An attempt to commit rape by force and violence and an assault with intent to commit rape against the same victim and at the same time are but two different ways of describing the same criminal act." (*Id.* at p. 354.) The court allowed the convictions of both attempted rape and assault with intent to commit rape to stand, but directed the parole agency, known as the "Adult Authority," not to consider the conviction of attempted rape as a conviction additional to that of the assault, and the court vacated the imposition of sentence on the charge of attempted rape. (*Id.* at pp. 353-354, 357.) Although *Ramirez* is somewhat oblique in its reasoning, it is consistent with our conclusion that appellant can be convicted of both offenses, and also consistent with the trial court's decision to stay the sentence for the appellant's attempted rape pursuant to section 654.

Accordingly, we reject appellant's contention that assault with intent to rape is a lesser included offense of attempted forcible rape for the purposes of the rule proscribing

multiple punishments.[4] We thus decline the invitation to set aside appellant's assault conviction, which is the greater offense in terms of potential punishment.

II. Imposition of sentence for both the burglary and the assault with intent to rape is permissible under section 654.

Contrary to appellant's contention, the trial court's imposition of sentence for an offense in addition to the burglary does not constitute double punishment in violation of section 654. The trial court sentenced appellant to a six-year upper term for burglary (count 1), and a consecutive one-year four-month term for assault with intent to rape (count 3). When appellant's counsel pointed out at sentencing that counts 2 and 3 involved the same act, the court agreed and pursuant to section 654 stayed the sentence for attempted forcible rape (count 2). Appellant's contention now that count 3 also should be stayed is without merit.

Appellant argues that pursuant to section 654, it is improper to impose sentence on either counts 2 or 3 with the sentence imposed on count 1 because all of the offenses constituted a single course of conduct with rape as the sole objective of the burglary. Indeed, if a defendant enters the burglarized premises with the single criminal objective of sexually assaulting the victim, section 654 would preclude punishing him for both the burglary and the sexual offenses of which he was convicted. (*People v. Hicks* (1993) 6 Cal.4th 784, 789.) If both offenses are "'incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.'" (*People v. Britt* (2004) 32 Cal.4th 944, 952.)

However, to ensure that punishment will be commensurate with criminal liability, it has been long held that "'the limitations of section 654 do not apply to crimes of

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[4] Whether the converse is true--i.e., whether attempted forcible rape is a lesser included offense of assault with intent to rape--is an issue not raised by appellant and which we thus need not address. We note, however that the Supreme Court in *People v. Rupp*, *supra*, 41 Cal.2d at page 382, observed in a somewhat different context that an attempted rape does not necessarily include an assault.

violence against multiple victims.'" (*People v. Oates* (2004) 32 Cal.4th 1048, 1063.) Thus, separate punishment may be imposed where a defendant commits an act of violence either with the intent to harm more than one person or by a means likely to cause harm to several persons. (*Ibid.*) Such a defendant is more culpable than one who harms only a single person and may be punished for each offense. (*Ibid.*)

In the present case, the record establishes that in addition to the assault victim (Arleen) there were two other occupants of the residence (Irene and Heather). Thus, there were two additional victims of the burglary, which appellant does not dispute is a violent crime. (See, e.g. § 667.5, subd. (c)(21).) Accordingly, consistent with section 654, the existence of multiple victims justified the imposition of multiple punishments as to counts 1 and 3.[5]

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

ASHMANN-GERST, J. CHAVEZ, J.

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[5] It is thus unnecessary to address respondent's speculative theory that when appellant entered Arleen's window, he intended to rape any and all of the several females inside the residence and thus could be punished for multiple offenses.