Filed 6/14/23 P. v. Alvarez CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RUBEN DIAZ ALVAREZ, JR., Defendant and Appellant.	E077924 (Super.Ct.No. BAF1601284) OPINION

APPEAL from the Superior Court of Riverside County. Jacqueline C. Jackson, Judge. Affirmed.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Charles C. Ragland, Assistant Attorney General, Eric A. Swenson and Felicity Senoski, Deputy Attorney Generals, for Plaintiff and Respondent.

Defendant and appellant Ruben Diaz Alvarez, Jr., offered to take Jane Doe to her friend's house, but instead brought her back to his home and sexually assaulted her. He was convicted of two counts of forcible rape, forcible oral copulation, attempted sodomy, and assault with the intent to commit rape. Defendant was also found to have been previously convicted of rape by force within the meaning of the "One Strike" law, and to have suffered two prior serious and violent felony convictions within the meaning of the "Three Strikes" law.

Defendant claims on appeal that (1) the trial court erred by failing to stay either of the sentences for both his conviction of rape by force or fear and assault with intent to commit rape, as one of his sentences must be stayed pursuant to Penal Code section 654[1]; (2) the trial court abused its discretion by failing to dismiss one of his prior serious and violent felony convictions in the interests of justice; and (3) his sentence of 275 years to life plus five years violates the federal and state constitutional prohibitions on cruel and/or unusual punishment.

FACTUAL AND PROCEDURAL HISTORY

A. PROCEDURAL HISTORY

The Riverside County District Attorney's Office charged defendant with rape by means of force or fear (§ 261, subd. (a)(2); counts 1 & 2); forcible oral copulation (§ 288a, subd. (c)(2)(A); count 3); attempted sodomy (§§ 664, 286, subd. (c)(2)(A); count 4); and assault with the intent to commit rape (§ 220, subd. (a); count 5). It was further

[1] All further statutory references are to the Penal Code unless otherwise indicated.

alleged as to counts 1, 2, and 3, pursuant to section 667.61, subdivision (d)(1), that defendant had suffered a prior conviction of rape by means of force or fear in 2011. It was additionally alleged that defendant had suffered a prior serious felony conviction within the meaning of section 667, subdivision (a), and that he had suffered two prior serious and violent felony convictions within the meaning of sections 667, subdivisions (c), and (e)(2)(A), and 1170.12, subdivision (c)(2)(a).

The jury found defendant guilty on all counts. It further found true the special allegation that defendant was previously convicted of rape by force within the meaning of section 667.61, subdivision (d)(1), for counts 1, 2 and 3. It also found the prior convictions alleged pursuant to sections 667, subdivisions (a), (c), and (e)(2)(A), and section 1170.12, subdivision (c)(2)(a), to be true.

Defendant was sentenced on October 20, 2021. The trial court imposed 75-years-to-life sentences on counts 1, 2 and 3, pursuant to the One Strike and Three Strikes laws, and ordered them to run consecutive. On counts 4 and 5, the trial court imposed 25-years-to-life sentences, pursuant to the Three Strikes law, and they were ordered to run consecutive to each other and to the sentences on counts 1, 2 and 3. In addition, the trial court imposed a five-year determinate sentence for the prior serious felony conviction found true pursuant to section 667, subdivision (a). Defendant received a total sentence of 275 years to life, plus five years.

B. FACTUAL HISTORY

1. *CURRENT INCIDENT INVOLVING JANE DOE*

a. Doe's Testimony

At approximately 3:00 or 4:00 p.m. on September 19, 2016, Jane Doe, who was 31 years old at the time of trial, was walking in Highland. She was carrying most of her belongings in a duffel bag. Defendant approached her in his vehicle and asked her if she wanted a ride. Doe accepted the ride and he drove her to her friend's house. He gave Doe his number in case she ever needed another ride.

Just a few hours later, Doe called defendant and asked for a ride to another friend's house in San Bernardino. Defendant picked her up, but rather than take her to her friend's house, he drove her to his mobile home in a mobile home park in Calimesa. Defendant invited her in telling her that he wanted to cook something. She agreed, bringing her belongings with her.

Defendant and Doe had some beer and food. They talked and defendant showed her around the mobile home. He told her she could take a shower. She took a shower, did her makeup and got dressed. They then sat on the couch watching television.

While they were watching television, defendant began rubbing her thighs and then her vagina over her clothes. Doe told him no several times and tried to move away. Defendant got angry and hit her in the face. Doe's eye began to swell. Doe had braces, which caused cuts inside of her mouth that were bleeding because she was hit.

Defendant removed all her clothes except for her underwear and removed his own clothes. He flipped her over and attempted to insert his penis in her anus but she kept moving away and resisting him. Doe was scared and did not think she could do anything to stop him. At some point, defendant put on a condom and was able to penetrate Doe's vagina on two occasions. She was able to push him away.

Doe was sitting on the couch and defendant told her "suck my dick." He removed the condom. She said no. Defendant forced her head down to his penis. Doe vomited on his penis. Defendant continued to push her head down on his penis. He gave her a cup to vomit in. Doe kept vomiting on him, the couch cushions, and into the cup he gave her. Doe indicated that defendant was pushing her head with one hand and holding his phone in the other hand, recording the entire incident.

Doe was able to get away from defendant by telling him she wanted to get some wax to cover her braces and that the wax was in her bag. He let her get her bag. She had nail polish remover in her bag that contained Acetone. She threw it in defendant's face and tried to run. Defendant did not relent and pulled her back to the living room by her hair.

Defendant forced her to take a shower. While she was in the shower, he told Doe that "he fucked up" and that he could not let her go. Doe was able to escape from the mobile home wearing only a towel. Doe ran through the mobile home park trying to find someone to call the police. She yelled out that she had been raped. No one came out to help her but some of the residents called the police.

A portion of Doe's preliminary hearing testimony was read for the jury. She testified that the first time she saw defendant was on September 19, 2016, when it was close to midnight. She denied he gave her a ride earlier in the day. She denied she ever took a shower that night prior to anything happening; they drank beer and watched television. She also went into the restroom to fix her hair and put on makeup. Defendant tried to kiss her on the couch but she jumped away, telling defendant that she had a boyfriend. Defendant took off her underwear and when she told him she "didn't want to do that" he "smacked" her in the face. She recounted that he forced her to orally copulate him and that she vomited. He gave her a cup to throw up in. She was able to get away and throw Acetone in his face. He grabbed her, tried to put his penis in her anus and was able to vaginally penetrate her on two occasions. He forced her to take a shower and then she escaped.

Doe did not tell police in interviews prior to trial that she had been given a ride by defendant earlier in the day because she was afraid that law enforcement would think the incident was her fault. At trial, Doe thought that defendant hit her twice. He hit her after she threw up on the couches.

b. Police Investigation

Riverside County Sheriff's Deputy Gimenez responded to the mobile home park around 3:15 a.m. on September 20, 2016, regarding reports of a woman having been raped. When he arrived, Deputy Gimenez observed Doe, who was only wearing a towel and was barefoot, waving her arms at him. The left side of her face was swollen. She told him that she had been raped. Doe was very emotional and shaken. Doe directed

Deputy Gimenez to defendant's mobile home, but defendant had already driven off in his car.

Doe advised Deputy Gimenez that defendant had picked her up and brought her back to his mobile home. Once there, he tried to have anal sex with her, penetrated her vagina with his penis two times, and forced her to repeatedly orally copulate him. She vomited on him. Defendant hit her in the face because she would not comply with his demands. Doe indicated that defendant had used a condom and recorded the incident on his cellular telephone. Defendant forced her to take a shower after the sexual encounters. Doe told the deputy that defendant put on another condom in the shower and tried to have sexual intercourse with her in the shower. Doe identified defendant from a six-pack photographic lineup.

Doe was interviewed again by Riverside County Sheriff's Investigator Lane on September 20, 2016, at the police station. Doe was very emotional. Doe told Investigator Lane that defendant hit her in the face when she would not comply with his demands; he forced her to orally copulate him while they were on the couch and she vomited; he attempted to anally penetrate her; and he penetrated her vagina two times. Doe's left eye was swollen and red. Doe did not disclose that defendant had given her a ride earlier in the day or that she had called him for a ride. She only took one shower after the sexual assaults occurred. He would not let her leave until she showered. Doe stated that defendant forced her to orally copulate him after the shower. Doe reported she left all of her belongings in the mobile home.

Defendant's mobile home was searched. The couch cushions were missing and a cup that appeared to contain vomit was found near the couch. A condom was found in the shower. Doe's bag and clothes were not found in the mobile home. Defendant was located at his work on September 20, 2016, at approximately 4:00 p.m. Couch cushions were found in the dumpster at his work that appeared to match the pattern of his couch at the mobile home. They smelled like vomit. Defendant's cellular telephone was seized and DNA samples were taken from him.

Four videos were recorded on defendant's cellular telephone between the hours of midnight and 2:00 a.m. on September 20. Three videos had been deleted from the cellular telephone. The phone did have the capability to copy the videos onto a memory card but the memory card was missing. A fourth video was still on the phone but it had been corrupted and could not be viewed.

c. DNA and Medical Examinations

Doe underwent a sexual assault exam at approximately 8:40 a.m. on September 20. Doe reported to the examiner that defendant had struck her in the face, twice vaginally penetrated her, attempted anal penetration, and forced her to orally copulate him causing her to vomit on him. Doe advised the examiner that she had only taken one shower with defendant and that she had been forced to orally copulate defendant in the shower. Doe had injuries to her face consistent with her report of defendant hitting her. Doe had substantial vaginal bleeding but she was on her menses. She had lacerations on her cervix. Doe's DNA was collected.

Numerous items were tested for DNA including the sexual assault kit from Doe's examination, the condom, couch pillows and cushions, and some urine and blood samples. A condom found in the mobile home had both DNA that belonged to defendant and to Doe. Fluids that appeared to be vomit, which were found on the couch pillows and cushions, matched Doe's DNA.

2. *PRIOR INCIDENTS*

a. R.H.

On February 2, 2006, 19-year-old R.H. was walking in Rubidoux at night when defendant pulled up in a white van and asked her if she wanted a ride. Doe accepted the ride. R.H. wanted to be taken to a specific location but then agreed to have a drink with defendant. Defendant took her to what looked like an abandoned house and then left briefly; when he returned he brought two large bottles of alcohol. Defendant asked R.H. to orally copulate him but she said no. He grabbed her head, forcing her to orally copulate him. R.H. told him she would do what he asked if he agreed to let her go without hurting her. Defendant agreed and she orally copulated him. She finally asked if she could leave and he agreed. She initially denied he ever tried to have sexual intercourse with her. R.H. ran next door and called the police. On the 911 call, she reported that a man had forced her to orally copulate him and raped her. He banged her head on the floor at some point. He forced himself on her.

The original 911 call was played. R.H. then recalled that defendant had banged her head hard on the floor and that she succumbed to his demands so that she would not get hurt. She could not recall if he raped her but thought that he probably had and she

could just not remember. When police arrived, R.H. stated that she had been raped by defendant.

b. A.M.

On April 5, 2007, A.M., who was homeless and carried all of her belongings with her, left a motel in Riverside and was walking to a bus stop. Defendant stopped and offered her a ride. A.M. got in defendant's van and told him she wanted to go to a friend's house who lived down the street. Instead, defendant drove to a strip mall and parked behind the businesses. Defendant asked A.M. to show him her breasts. A.M. told him no and he proceeded to punch her in the side of the head "really hard." A.M. showed him her breasts. Defendant demanded that A.M. get in the back of his van because they were "going to bone now."

A.M. got into the back of the van because she was afraid that defendant was going to hurt her. He tried to anally penetrate her but was unsuccessful. Defendant then had vaginal intercourse with A.M. A.M. did not resist because she was afraid that he would hit her. Defendant hit A.M. again and told her to leave. She memorized the license plate number. A.M. had a black eye and her cheek was bruised as a result of defendant hitting her. A.M. reported the incident to police. Defendant was allowed to enter into a plea agreement.

The trial court took judicial notice of defendant's convictions in 2011 for forcible rape and criminal threats based on consolidated cases involving A.M. and R.H.

Defendant presented no evidence on his behalf.

DISCUSSION

A. SECTION 654

Defendant contends the trial court should have stayed his 25-years-to-life sentence on count 5 pursuant to section 654 because the assault with intent to commit rape was committed with the same intent and objective as the rape offenses in counts 1 and 2. The assault with the intent to commit rape was committed so that he could accomplish the rapes in counts 1 and 2. Defendant also contends that upon remand, the trial court should consider the change to section 654 promulgated by Assembly Bill No. 518 (Stats. 2021, ch. 441, § 1), which allows for the trial court to stay execution of the sentence that provides for the longest term and impose the shorter term. We conclude that the trial court imposed the consecutive sentences in this case pursuant to section 667.6, subdivision (d), and that section 654 does not apply to the imposition of the sentences on counts 1, 2 and 5. Even if section 654 did apply to the sentences imposed in this case, we conclude that section 654 does not apply to stay the imposed sentence.

1. *ADDITIONAL FACTUAL HISTORY*

Section 654 was discussed in the probation report. It was noted that defendant committed five wrongful acts. The probation report stated, "Each offense is independent of the others, demonstrating a divisible course of conduct for which multiple punishments are proper. Therefore, sentencing limitations pursuant to section 654 do not apply."

In their sentencing memorandum, the People argued that defendant should receive a sentence of 275 years to life plus five years. He was subject to 25-years-to-life sentences on counts 1, 2 and 3 under the One Strike law. Each of the 25-years-to-life

sentences would be tripled under the Three Strikes law, for a total of 225 years to life on counts 1, 2 and 3. In addition, the trial court should impose a Three Strikes law sentence on counts 4 and 5, each being 25 years to life. This would make a total of 275 years to life. The People argued, "A full, separate, and consecutive term shall be imposed for each violation pursuant to Penal Code section 667.6(d)." The People also argued that he should be sentenced to an additional five years for the section 667, subdivision (a), prior. At sentencing, defense counsel only argued, "In terms of the sentence, there's not a lot of discretion here. We're simply asking the Court in areas where the Court is able to exercise discretion to do so for [defendant]. Regardless, he is facing multiple life sentences in this case."

The trial court stated it had read the People's sentencing brief. The trial court found there were multiple aggravating factors, including that the crime involved great violence, the manner in which it was carried out indicated planning or sophistication, and defendant took advantage of a position of trust or confidence. Defendant was a danger to society. There were no mitigating factors. The trial court stated it would sentence defendant under the One Strike scheme. The trial court found, in imposing a consecutive sentence on counts 1 and 2, "the Court is imposing consecutively since I'm finding they are separate offenses against the same victim; so there was enough reflective time, I believe, between Count 1 and Count 2 to reflect and stop the assault, but instead, [defendant] chose to re-engage and continue to assault; so for that reason—actually, everything is going to run consecutively." The trial court ordered that count 5 run consecutive to all counts.

2. *ANALYSIS*

Assault with the intent to commit rape is a violent sexual offense listed under section 667.6, subdivision (e)(9). The two rape offenses in counts 1 and 2 are listed as violent sexual offenses under 667.6, subdivision (e)(1). These offenses qualified defendant for sentencing pursuant to section 667.6, subdivision (d).

Section 667.6, subdivision (d)(1) provides, "A full, separate, and consecutive term shall be imposed for each violation of an offense specified in subdivision (e) if the crimes involve separate victims or involve the same victim on separate occasions." Subdivision (d)(2) of section 667.6 provides, "In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon the defendant's actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned the opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions."[2]

"Section 667.6, subdivision (d) does not permit any discretion in sentencing a person convicted of committing violent sex offenses against more than one victim or

[2] The California Supreme Court recently found in *People v. Catarino* (May 25, 2023, S271828) 2023 Cal. LEXIS 2804, that the requirement of section 667.6, subdivision (d), that the trial court impose full, consecutive terms for certain sex crimes complies with the Sixth Amendment.

against the same victim on more than one occasion. The Legislature has declared that these serious crimes demand harsher punishment. Full, separate and consecutive sentences must be served for each conviction. Further, a person subject to section 667.6, subdivision (d) must be sentenced in a manner that does not dilute the impact of full, consecutive terms of imprisonment. The statute requires that the prison term imposed 'shall not be included in any determination pursuant to Section 1170.1.' Thus, it may not be used to reduce the term of any other conviction. The computations under sections 1170.1 and 667.6, subdivision (d) must always be done separately and the total of the section 667.6, subdivision (d) sentences added to any sentence computed independently under section 1170.1." (*People v. Pelayo* (1999) 69 Cal.App.4th 115, 124-125.)

In *People v. Hicks* (1993) 6 Cal.4th 784, the Supreme Court considered whether a trial court when sentencing pursuant to section 667.6, subdivision (c),[3] also must consider the provisions of section 654. It concluded, "[T]he only reasonable interpretation of section 667.6(c) is that it permits imposition of consecutive full-term sentences, notwithstanding the provisions of section 654, when the defendant is convicted of an

[3] Section 667.6, subdivision (c) provides, "In lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation of an offense specified in subdivision (e) if the crimes involve the same victim on the same occasion. A term may be imposed consecutively pursuant to this subdivision if a person is convicted of at least one offense specified in subdivision (e). If the term is imposed consecutively pursuant to this subdivision, it shall be served consecutively to any other term of imprisonment, and shall commence from the time the person otherwise would have been released from imprisonment. The term shall not be included in any determination pursuant to Section 1170.1. Any other term imposed subsequent to that term shall not be merged therein but shall commence at the time the person otherwise would have been released from prison."

offense enumerated in section 667.6(c), based upon the commission of a separate act that constituted part of an indivisible course of conduct." (*Hicks,* at p. 792.) It found, " 'Such increased penalties are appropriate, because a defendant who commits 'a number of base criminal acts on his victim is substantially more culpable than a defendant who commits only one such act.' " (*Id.* at p. 796.) The *Hicks* court further held, "An examination of the legislative history of section 667.6(c) also supports our conclusion that the enactment of section 667.6(c) created an exception to section 654." (*Id.* at p. 792.) This reasoning applies equally to subdivision (d) of section 667.6. As found by *Hicks*, "[s]ubdivision (c) states the general rule that such sentences may be imposed for each violation of the enumerated offenses. Subdivision (d) modifies the general rule by providing that such sentences are mandatory 'if the crimes involve separate victims or involve the same victim on separate occasions.' " (*People v. Hicks*, *supra,* 6 Cal.4th at p. 794.)[4] Subdivision (d) of section 667.6 is not independent of subdivision (c) making it clear it also is not subject to section 654 if the defendant commits separate acts against a single victim.

"[O]nce the trial judge resolves the issue of 'separate occasions,' an appellate court is 'not at liberty to overturn the result unless no reasonable trier of fact could decide that there was a reasonable opportunity for reflection.' " (*People v. Pena* (1992) 7 Cal.App.4th 1294, 1314-1315.)

---

[4] In *People v. Siko* (1985) 45 Cal.3d 820, the court held that section 667, subdivision (c), does not create an exception to section 654 for a single act. (*Siko*, at pp. 823-826.) This is not the situation in this case. There were multiple acts committed against Doe.

Here, the People argued in their sentencing brief that consecutive sentences should be imposed pursuant to section 667.6, subdivision (d). The trial court found that defendant had time to reflect and stop the assault. Each of the crimes was committed on separate occasions. Based on Doe's trial testimony, defendant hit her when he was rubbing her thighs and taking off her clothes because she keep telling him no. He then rolled her over and tried to sodomize her. He put on a condom at some point and vaginally penetrated her on two separate occasions. The trial court could conclude that defendant had a reasonable time to reflect on his decision to rape Doe, including time to decide to put on a condom, after hitting her in the face.

Defendant does not argue the trial court erred by finding that between the commission of the assault to commit rape and the two rapes he had a reasonable opportunity to reflect upon his actions. Defendant was properly sentenced pursuant to section 667.6, subdivision (d), which required only a finding that he had committed the violent sex offenses on separate occasions. As such, the trial court properly imposed a consecutive sentence on count 5 pursuant to section 667.6, subdivision (d).

Moreover, even if we were to consider defendant's argument that the trial court should have stayed the sentence pursuant to section 654, we would reject the claim. At the time that defendant was sentenced, former section 654, subdivision (a), provided, "[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." "When a court determines that a conviction falls within the meaning of Penal

Code section 654, it is necessary to impose sentence and to stay the execution of the duplicative sentence." (*People v. Mani* (2022) 74 Cal.App.5th 343, 380, italics omitted.)

"Under section 654, 'a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment. [Citations.]' [Citations.] This is particularly so where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken." (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935; see also *People v. Kelly* (2016) 245 Cal.App.4th 1119, 1136 ["if a series of acts are committed within a period of time during which reflection was possible [citation], section 654 does not apply"].)

Here, the trial court found that defendant committed separate offenses against the same victim. The trial court found that defendant had time to reflect between the offenses that constituted counts 1, 2 and 5. The sexual attack on Doe took place for several hours. Defendant had time to stop after hitting Doe in the face, causing her to bleed, to decide to put on a condom. He then vaginally penetrated Doe on two separate occasions. The trial court properly imposed consecutive sentences on counts 1, 2, and 5. Remand for resentencing is not necessary.

B. PRIOR CONVICTION

Defendant contends the trial court erred by refusing to strike his prior conviction of making criminal threats suffered in 2011. He insists this is the "unusual case" in

which the trial court abused its discretion by failing to dismiss his prior threats conviction because it failed to impose an individualized, equitable sentence.

1. *ADDITIONAL FACTUAL HISTORY*

According to the probation report, defendant was convicted on February 21, 2001, of violating section 243, subdivision (e)(1)—battery of a spouse, cohabitant or someone with whom there is a relationship—and received three years probation. He had vehicle offenses in 2002 and 2005 for which he received probation. On March 30, 2011, he entered a plea agreement on the priors alleged in this case, criminal threats and forcible rape. He received a sentence of three years and eight months. He was released on parole the same day.

Prior to trial, defendant brought a motion to strike his prior conviction of making criminal threats, for purposes of sentencing pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). Defense counsel argued that even if the trial court struck the prior conviction, defendant still faced the rest of his life in prison. Defense counsel contended that defendant was 30 years old when he committed the prior conviction. The strike conviction was 10 years old and he had sustained no further strike convictions.

The People opposed the *Romero* motion. The People argued that defendant was a serial rapist who repeatedly sought out troubled women and forcibly raped them. Defendant had a criminal history dating back to 2001, where he was convicted of violating section 243, subdivision (e)(1). Defendant "was in custody from 2006 to 2011, and again from 2016 to the present date. . . . Then after being released from custody for

violent sexual assaults against two women, . . . defendant raped [Doe]." Defendant was not entitled to relief based on his lack of remorse and continued criminal activity. Defendant was a danger to society.

At sentencing, the trial court heard argument on the *Romero* motion. Defense counsel argued that defendant would still receive a life sentence even if the trial court were to strike the prior conviction of making criminal threats.

The trial court noted that it had reviewed the motions filed by the parties and considered the arguments. The trial court was aware that a number of years had passed since the prior convictions, but defendant had only been out of custody for five years when he committed the current offense against Doe. The trial court concluded, "I'm not finding he is outside the scheme. I don't think he is a proper candidate for the Court to exercise 1385 power, and his *Romero* motion is denied." The trial court also noted that under newly enacted Senate Bill No. 81[5] defendant would not be a proper candidate to have his prior convictions dismissed under section 1385. Defendant had an "incredibly violent history" and "some of the worst crimes we see outside of homicide."

[5] Senate Bill No. 81 (2021-2022 Reg. Sess.) (Stats. 2021, ch.721) modified section 1385 effective January 1, 2022. The trial court addressed the amendment and determined that defendant was a danger to society and would not be entitled to dismissal of the strike under amended section 1385. We note that the amendment appears to apply only to sentencings occurring after January 1, 2022, and defendant was sentenced on October 20, 2021. (§ 1385, subd. (7) ["This subdivision shall apply to all sentencings occurring after January 1, 2022"].) Defendant does not argue on appeal that the determination by the trial court that he was a danger to society was erroneous or that the amendment to section 1385 applies in this case.

2. *ANALYSIS*

In determining whether to strike a prior conviction, the trial court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) " '[T]he circumstances must be "extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack" [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary.' " (*People v Vargas* (2014) 59 Cal.4th 635, 641.)

The denial of a *Romero* motion is reviewed under the deferential abuse of discretion standard. (*People v. Williams*, *supra*, 177 Cal.4th at p. 162.) " 'Under that standard an appellant who seeks reversal must demonstrate that the trial court's decision was irrational or arbitrary. It is not enough to show that reasonable people might disagree about whether to strike one or more of [the] prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance.' " (*People v. Romero* (2002) 99 Cal.App.4th 1418, 1434.)

The trial court denied the *Romero* motion finding that defendant did not fall outside the scheme of the One Strike and Three Strikes laws. The trial court also found that defendant was a serious danger to others. Defendant had committed his violent crime only five years after being released from prison on charges stemming from sexual assaults on two other women. The trial court noted that defendant had a violent history and he had committed the worst crimes outside of homicide. The trial court also concluded that defendant was a great danger to society.

The trial court properly considered that defendant had a violent history, targeting women who were alone and vulnerable. Defendant forced these women to orally copulate him and have sexual intercourse. The current offense occurred over an extended period with defendant refusing to relent even though Doe fought back and vomited on him. The current offenses were violent sexual offenses pursuant to section 667.6, subdivision (e). Defendant demonstrated he was a danger to society as he had a pattern of targeting women and sexually assaulting them. The trial court properly refused to exercise its discretion pursuant to *Romero* and section 1385 to dismiss the prior conviction.

Defendant contends that the trial court should have considered the length of his sentence in denying his request to strike his criminal threats conviction. He was entitled to an equitable, individualized sentence. Although the prosecutor, in arguing against the *Romero* motion, stated that the length of defendant's sentence was not properly considered a factor in resolving the motion, the trial court did not state that it adopted the prosecutor's reasoning. The trial court stated that it was considering the particulars of

defendant's background, character and prospects in determining whether defendant was outside the scheme of Three Strikes law. The record supports that the trial court considered numerous factors in deciding not to strike the prior conviction; defendant received an individualized sentence. Defendant's claim that the trial court should have struck one of his prior convictions is rejected.

C. CRUEL AND/OR UNUSUAL PUNISHMENT

Defendant insists his sentence of 275 years to life plus five years constitutes cruel and/or unusual punishment under the state and federal Constitutions. His de facto life without the possibility of parole sentence is not justified by the nature of his conduct, harm to the victim, or danger to the public.

The People contend that defendant has forfeited his claim by failing to raise the claim in the trial court. Defendant, anticipating such argument, has contended that if this court finds he forfeited his claim, then he received ineffective assistance of counsel.

We find that defendant has in fact forfeited his claim on appeal. "Defense counsel did not argue that the sentence constituted cruel and unusual punishment under the United States Constitution or the California Constitution when the trial court indicated the sentence it intended to impose or when the court actually imposed sentence. Because defendant failed to make the contention that his sentence constituted cruel and unusual punishment in violation of the Eighth Amendment or article I, section 17, of the California Constitution in the trial court, he has forfeited the issue." (*People v. Brewer* (2021) 65 Cal.App.5th 199, 212; see also *People v Russell* (2010) 187 Cal.App.4th 981, 993.)

However, defendant's claim is reviewable as an ineffective assistance of counsel claim. "The standard for showing ineffective assistance of counsel is well settled. 'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.] A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel.' " (*People v. Gray* (2005) 37 Cal.4th 168, 206-207; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687.)

We conclude that defendant's counsel did not provide ineffective assistance as his failure to object to the sentence on cruel and unusual punishment grounds would have been rejected by the trial court. Defendant cannot show he was prejudiced.

"Cruel and unusual punishment is prohibited by the Eighth Amendment to the United States Constitution and article 1, section 17 of the California Constitution." (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 358, fns. omitted.) "A sentence violates the federal Constitution if it is 'grossly disproportionate' to the severity of the crime. (U.S. Const., 8th & 14th Amends.)" (*People v. Russell, supra,* 187 Cal.App.4th at p. 993.)

In *In re Lynch* (1972) 8 Cal.3d 410, the court analyzed the question of cruel and unusual punishment pursuant to article I, section 17 of the California constitution. The court described three factors to determine whether a sentence constitutes cruel or unusual punishment: (1) "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society;" (2) a comparison of the sentence to "punishments prescribed in the same jurisdiction for different offenses which, by the same test, must be deemed more serious;" and (3) a comparison of the sentence "with the punishments prescribed for the same offense in other jurisdictions having an identical or similar constitutional provision." (*Id.* at pp. 425-427, italics omitted.)[6]

Defendant was sentenced consecutively on all counts pursuant to section 667.6, subdivision (d). "Regarding Eighth Amendment claims, '[r]eviewing courts must " 'grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes.' " ' " (*People v. Brewer*, *supra*, 65 Cal.App.5th at p. 213.) Moreover, "[I]t is immaterial that defendant cannot serve his sentence during his lifetime. In practical effect, he is in no different position than a defendant who has received a sentence of life without possibility of parole: he will be in prison all his life. However, imposition of a sentence of life without possibility of parole in an appropriate case does not constitute cruel or unusual punishment under either our state Constitution [citation] or the federal Constitution." (*People v. Byrd* (2001) 89 Cal.App.4th 1373, 1383.)

---

[6] Defendant only addresses the first factor in *Lynch*.

We note that numerous other courts have concluded the fact that a sentence exceeds a defendant's life expectancy does not necessarily render it constitutionally cruel or unusual. (See, e.g., *People v. Byrd*, *supra*, 89 Cal.App.4th at pp. 1382-1383 [upholding sentence of 115 years plus 444 years to life despite defendant's inability to serve sentence during his lifetime]; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1130, 1135-1136 [upholding sentence of 375 years to life plus 53 years for series of violent sexual assaults]; *People v. Wallace* (1993) 14 Cal.App.4th 651, 666-667 [upholding sentence of 283 years and 8 months for 46 sex offenses against seven victims]. Not only was defendant sentenced under section 667.6, subdivision (d), but he was also a recidivist who committed prior sexual offenses. " 'Recidivism in the commission of multiple felonies poses a manifest danger to society justifying the imposition of longer sentences for subsequent sentences.' " (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 570.)

In *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 531-532 (*Bestelmeyer*), the defendant argued that section 667.6, subdivision (d), as applied to him, constituted cruel and unusual punishment. The defendant pointed to the fact that he had no prior criminal record and was suffering from a mental impairment at the time he committed the crimes. (*Id.* at pp. 528-530.)

The *Bestelmeyer* court upheld his sentence of 129 years for 25 sex crimes, which included crimes of oral copulation and sodomy, against one victim. First, it noted, "A defendant has a considerable burden to overcome when he challenges a penalty as cruel or unusual. The doctrine of separation of powers is firmly entrenched in the law of

California and the court should not lightly encroach on matters which are uniquely in the domain of the Legislature. We must always be aware that it is the function of the legislative branch to define crimes and prescribe punishments." (*Bestelmeyer*, *supra*, 166 Cal.App.3d at p. 529.) It concluded, in assessing the first factor in *Lynch*, that "when we weigh these factors which relate to the defendant against the very serious nature of these offenses and the very real danger to the community, we cannot conclude that the sentence is so disproportionate to the crimes for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*Bestelmeyer*, at p. 530.) It rejected the remaining two factors and found "the Legislature was well within its constitutional prerogatives when it mandated full-term consecutive sentences for the type of sex crimes we see in this case." (*Id.* at pp. 531-532.)

Here, defendant repeatedly sexually assaulted Doe while she vehemently resisted. He threatened her that he could not let her go after the sexual assaults, and Doe had to escape wearing nothing but a towel. Defendant's crimes, as noted by the trial court, were the worst crimes other than homicide. Further, not only was defendant sentenced pursuant to section 667.6, subdivision (d), but unlike the defendant in *Bestelmeyer*, defendant had a prior record of committing sexual offenses. "Defendant qualifies as 'precisely the type of offender from whom society seeks protection by the use of recidivist statutes.' " (*People v. Sullivan*, *supra*, 151 Cal.App.4th at p. 570.)

We conclude that defendant failed to show that he was prejudiced by his counsel's failure to object to his sentence as cruel and/or unusual punishment under the state and/or federal Constitutions.

DISPOSITION

In all respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
Acting P. J.

We concur:

RAPHAEL
J.

MENETREZ
J.