



The People v. Matthew Guidry et al

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P. v. Guidry

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Appellants Matthew Guidry, Jerel Joynes and Terry Webbs were convicted, following a jury trial, of one count of forcible rape, two counts of forcible oral copulation in concert, five counts of home invasion robbery, one count of first degree burglary and one count of sexual penetration with a foreign object. Guidry was convicted of one additional count, second degree robbery, which took place about two weeks before the home invasion robbery. The jury found true the allegations that the robbery and sexual offenses were committed for the benefit of a criminal street gang within the meaning of Penal Code¹ section 186.22 subdivision (b)(1)(C) and that a principal was armed during the commission of those offenses within the meaning of section 12022.53, subdivisions (b) and (e)(1). The jury also found true the allegations that the sexual offenses were committed during a burglary within the meaning of section 667.61, subdivision (b) and that the sexual offenses involved tying or binding within the meaning of section 667.61, subdivision (e). The jury further found true the allegations that Joynes and Guidry personally used a firearm. The trial court sentenced Guidry to a total of 323 years to life in prison. The court sentenced Joynes and Webbs to 310 years to life in prison.

Appellants appeal from the judgment of conviction. They contend that there is insufficient evidence to sustain the rape conviction, the conviction for robbery of S., the tying and binding allegations and the gang allegations.² Joynes also contends that a juror committed misconduct by lying to the trial court about a prior felony conviction and that the trial court erred in failing to determine if her civil rights had been restored. Joynes further contends that the trial court erred in instructing the jury with CALCRIM No. 400 concerning aiding and abetting. Webbs and Guidry join in these contentions. Guidry also contends that the trial court erred in imposing full consecutive sentences with a life term for counts 4 through 8. Webbs and Joynes join in this contention.

Facts³



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About 2:40 a.m. on June 26, 2008, someone kicked open the front door of a family's house near Inglewood. The family consisted of parents Irving and Sandra, their daughter S. (aged 21) and sons Reginald (aged 31) and Christopher (aged 17). Appellants and other unknown persons entered the house.

Christopher, who slept on a sofa in the living room, was the first family member to have contact with the intruders. He heard a big thump and then saw appellant Guidry walking toward him holding a machine-gun type firearm. Guidry was wearing a red t-shirt. Guidry ordered Christopher to lay on the floor with the family dog, then demanded money from him. Christopher replied that he had no money on his person, but had some money in his parents' bedroom. Guidry took Christopher there. Along the way, Christopher saw appellant Joynes standing on the front porch as if he were a lookout. Joynes was wearing a red t-shirt and was the biggest of the men Christopher saw in the house.

Just as Christopher and Guidry reached Christopher's parents' room, Irving opened the door. His attention had been attracted by the noise from the living room. Guidry demanded money and jewels. Sandra woke up and became hysterical. Sandra and Irving told Guidry that they had no money or jewels. Christopher found several dollars on his own dresser (which was in his parents' room) and gave them to Guidry. Guidry asked if that was all they had. Irving explained that he was a mailman and did not earn much money. Christopher offered his "X-box."

Guidry left the bedroom briefly and then returned with a second man (the only participant not wearing a red t-shirt). Guidry said he would kill the family if they did not give him money. The second man tied the hands of Christopher, Irving and Sandra. Webb entered the bedroom. These three victims then stayed on their backs on the parents' bed until they were untied by Reginald after the intruders left.

One of the intruders kicked in the door to Reginald's bedroom. The intruder had a firearm. He told Reginald to lay face down. A second man entered the bedroom and tried to tie Reginald's hands behind his back. The men demanded money and jewels, and ransacked the bedroom. They also asked for guns. The men became increasingly angry and kicked Reginald in the head about 30 times. Joynes entered the bedroom, put his foot on Reginald's head, pointed a gun at him, asked him if he wanted to die and demanded money. The men eventually took Reginald's 32-inch television and other property.

S. heard sounds of pain from Reginald, went into the hallway, and saw Reginald face down on the floor. One of the intruders said to S., "Where's your money? Where's your jewels?" Joynes put his gun to S.'s head, backed her into her bedroom and said, "Bitch, take off your clothes and play with yourself." S. complied. Joynes went to the doorway and said, "Blood, do you have any rubbers?" After receiving a negative reply, Joynes asked Reginald where he kept his condoms. Reginald said, "Come on, man." Joynes said, "What? You don't fuck?"



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Joynes came back and told S. to lick her fingers. He inserted an object into her vagina. It felt like the ear piece of a pair of glasses. He forced it in and out of her vagina. It hurt. At some point he told her to lick the object. Joynes then told S. to get on her knees. He pulled her to face him, then dropped his pants and underwear. He put his gun next to her head and told her to suck his penis. She complied. Eventually, Joynes ejaculated. He told S. to swallow and she complied.

Another man came into the room and said, "Oh, let me get some of that." He forced S. to orally copulate him. He was very rough with her. After he ejaculated, he said that he wanted "pussy." He turned and pushed S. so that she was bent at the waist and her upper torso was bent forward with her face on the mattress. He attempted to force his penis into her vagina. He did not succeed in penetrating her vagina. At some point he stopped trying. He forced S. into the bathroom and told her to wash her mouth out with mouthwash. She did it several times. The man left. S. could not identify this second man but, both Joynes and Guidry later admitted to a gang associate that they had both received oral sex during a robbery, which would make Guidry the second man.

S. saw the intruders leave the house through the front door. Guidry was the last to leave.

Reginald checked on S., untied his parents and Christopher and called "911." Police officers and the fire department arrived at the house about 3:30 a.m. It was determined that the following property was taken from the house: Reginald's cell phone, wallet, watch, Calvin Klein cologne set and television; Christopher's X-box game, controller and video games, iPod, skateboard, cell phone and two or three dollars; Irving's wallet, power tools and several bottles of alcohol; Sandra's cell phone and credit cards; and a vase, antique record player and video games.

S. was treated at a rape treatment center beginning about 6:00 a.m. There were no signs of trauma to her vaginal or anal areas. Semen was found on S.'s mouth swab, lip swab, labial swab and buttocks swab. Webbs and Guidry were excluded as possible donors of the semen. Joynes's DNA matched at a ratio of 1 out of every 370 African-American males.

The next day, about 1:30 a.m., Joynes and Webbs were arrested in a car in the area of 77th Street and Crenshaw. Guidry was near the car and attempted to flee when officers approached, but was detained. He gave police the false name of Dwayne Hatfield. A bottle of liquor, a watch and a cell phone were found at the scene. The cell phone was one of the ones taken from the family.

Police obtained a warrant and searched an apartment at the Crenshaw scene. They found an X-box game, the other two stolen cell phones and a Calvin Klein cologne set.

About 12:30 p.m., a Los Angeles Police Department detective brought the victims to the Crenshaw scene to see if they could identify anyone from a group of about eight detained African-American men. Reginald did not identify anyone. S. identified Joynes. Irving identified Guidry and Webbs. Christopher identified Joynes, Guidry and Webbs. He later said Webbs looked like the one who tied



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him and his parents up. Sandra identified Guidry and later said Webbs could have been the man who tied her up. She also said Joynes looked like the man in the hallway. Christopher, Irving and Reginald identified some of their stolen property at the show up conducted at the scene.

At some point during the search of the Crenshaw scene, Sean Arkeem, an associate of the Bounty Hunters gang, told police that earlier that morning, he was sleeping in the searched apartment, looked up and saw Guidry playing an X-box. He later heard Joynes and Guidry "giggling" about "getting head" and having a machine gun while someone else had a "nine" when they got "stuff" from a house. Joynes said that by the time he entered the room, Guidry had "the girl sucking" his penis. Arkeem asked to be relocated from Los Angeles because he had become a "snitch."

On July 4, 2008, while in jail, Guidry told his girlfriend that he was charged with robbery and rape, and was going into the army after his release because he had to get out of Inglewood. He said that "the only reason I won't go is cuz you still in Inglewood." He admitted that "we did the whole 'lil home invasion kick down your door yeah and [everything]." He also said, as to "[e]xtra shit," like the rape charge "sounds stupid" and "was not even my MO, my shit is get the money and get on!"

Inglewood Police Officer Kerry Tripp testified as a gang expert at trial. He explained that generally, gang members earn money for their gang by committing robberies. Members also commit crimes to advance within the gang. The more violent or dangerous the crime, the faster the advancement. Members often commit crimes with fellow gang members for protection purposes, or to prove to accomplices that they are committed to the gang's success or expansion. Gangs do not like snitches and will often kill a snitch if he is found.

Officer Tripp testified that the "Inglewood Family" is a Blood gang with about 500 known members at the time of the crimes in this case. Its members are associated with the color red. The primary activities of the gang include gun possession, murder, robbery, burglary, rape and intimidating witnesses. Joynes claimed membership in the Inglewood Family and Inglewood's Centinela Park Family Bloods. The crimes in this case took place in territory claimed by the Inglewood Family gang. Webbs was a member of Inglewood's Queen Street Bloods. That gang's primary activities include murder, shootings, robbery, assault, burglary and narcotics possession and sales. According to Los Angeles Police Officer Francis Coughlin, Guidry was a member of the Bounty Hunters Blood gang. The primary activities of that gang include murder, robbery, narcotics sales, carjacking and graffiti.

In response to hypothetical questions with facts like the facts in this case, Officer Tripp opined that the robberies and sex crimes would be committed for the benefit of the Blood gang. Two of the facts in the hypothetical were that the perpetrators wore red shirts and called each other "Blood." Officer Tripp explained that wearing the red shirts was like wearing a uniform during the crime. That, plus the nature of the crimes would encourage fellow gang members to commit the same type of crimes. Further, taking property showed that the gang members planned to sell the property to profit the gang.



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Discussion

1. Juror misconduct

During voir dire, Prospective Juror No. 278 told the court that she had been convicted of a felony but had been pardoned. Joynes contends it is extremely unlikely that she was pardoned and that the trial court erred in failing to inquire further into her claim of a pardon. Webbs and Guidry join in this contention.

Respondent contends that appellants' claim has been forfeited by their failure to make this argument in the trial court. We agree. (People v. Moreno (2011) 192 Cal.App.4th 692, 706-707 [defendant forfeited claim that juror did not meet English language requirements of Code Civ. Proc., § 203, subd. (a)(6)].)

Joynes contends that if this claim has been forfeited, he received ineffective assistance of counsel. In order to establish such a claim, appellant must show that his counsel's performance fell below an objective standard of reasonableness, and that, but for counsel's error, a different result would have been reasonably probable. (Strickland v. Washington (1984) 466 U.S. 668, 687-688, 694; People v. Ledesma (1987) 43 Cal.3d 171, 216-218.) ""Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"" [Citations.]" (People v. Thomas (1992) 2 Cal.4th 489, 530-531.)

A person who has been convicted of a felony is not eligible to serve on a jury unless their civil rights have been restored. (Code Civ. Proc., § 203, subd. (a)(5).)

Here, Juror No. 278 told the court: "I had a felony conviction and 10 years ago." She added: "I paid my sentence." The court asked, "Did you get it exonerated or, I mean--" The juror said, "I had it pardoned a couple years ago." She explained that the conviction was for theft. The court asked: "Was it a felony or misdemeanor if you know?" The juror replied, "Well, it started as a misdemeanor but then they raised it up to a felony." Finally, the court asked, "What was the sentence that you got?" Juror No. 278 replied, "Just community time and fines." The court asked for the alleged amount of the theft, and the juror replied, "\$450." The court said, "Okay. So that sounds like a misdemeanor probably, but anyway."

Joynes's trial counsel did not object to the trial court's implied finding that Prospective Juror No. 278 was qualified to serve on the jury. This could easily have been sound trial strategy. Trial counsel might reasonably have believed that Juror No. 278 would be sympathetic to the defendants based on her own experiences and for that reason decided not to challenge her pardon claim. Such a decision cannot be the basis for an ineffective assistance of counsel claim.



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Further, we see no error in the trial court's determination that Juror No. 278 was qualified to serve on the jury. For that reason as well, appellant's counsel acquiescence of the court's determination was reasonable.

Joynes contends that pardons are extremely rare, and that it is unlikely that Juror No. 278 actually received a pardon for her offense. There is no evidence to support this contention in the record. We will assume for the sake of argument that appellants are correct about the likelihood of a pardon.

The trial court's questions show it recognized that Juror No. 278 was confused about the exact legal status of her conviction. There is nothing to indicate that the court relied on Juror No. 278's pardon claim or believed that she was attempting to mislead the court. The court continued to question her after her pardon claim in an attempt to clarify the nature of the conviction, and ultimately concluded that she suffered only a misdemeanor.

Although Juror No. 278 stated that she was convicted of a felony, she also stated that her sentence was "[j]ust community time and fines." The felony she described, theft in excess of \$400 (grand theft), was a wobbler in 2000, "punishable by confinement in the county jail for not more than one year or in the state prison." (§ 489, subd. (b).) Theft of less than \$400 dollars was "punishable by fine not exceeding one thousand dollars (\$1,000), or by imprisonment in the county jail not exceeding six months, or both." (§ 490.)

In 2000, when Juror No. 278 was sentenced, the punishment for a wobbler determined the degree of the offense. If Juror No. 278 was in fact sentenced to "[j]ust community time and fines," the sentence made her offense a misdemeanor. Community time normally means time spent in county jail. The trial court found the juror's statement about her sentence to be the most accurate description of the offense. We see no error in that decision.

To the extent that appellants contend that Juror No. 278 committed misconduct simply by lying about the pardon, we do not agree.

There is no reason to believe that Juror No. 278 was deliberately making a false statement. There would be no reason for her to admit a felony conviction but lie about the pardon. By all accounts, the juror volunteered the fact of the conviction. If, as Joynes contends, Juror No. 278 was so determined to be on the jury that she would commit perjury, she could have simply denied having any felony convictions. It seems much more likely that she was simply confused about the outcome of her case.

Juror No. 278 stated at one point that she was charged with a felony. Her sentence, however, was for community time and fines, which, as we discuss, ante, would make the offense a misdemeanor. Thus, it appears that the sentencing court opted to reduce her offense to a misdemeanor and spare her prison time and other consequences of a felony. Common definitions of "pardon" include "to release (a person) from further punishment for a crime" and "to cancel or not exact a penalty for (an



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offense)." Juror No. 278 may well have understood the court's act as a "pardon."⁴

2. CALCRIM No. 400

Joynes contends that CALCRIM No. 400 was misleading in two respects. Guidry and Webbs join in this contention. Respondent contends that appellants have forfeited the claim by failing to object in the trial court. We will assume for the sake of argument that the claim is not forfeited.

CALCRIM No. 400 provides: "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. A person is equally guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it." (Italics added.)

Joynes first contends that the two italicized phrases erroneously imply that a perpetrator did in fact commit a crime. He contends that this lessened the People's burden of proof by permitting a defendant's conviction for aiding and abetting a crime without proof that someone actually directly committed the crime. He contends that the phrases should have been modified to read "who may have committed" the crime.

We see no possibility that the jury understood the instruction in the manner suggested by appellants. The phrase "perpetrator who committed a crime" does not imply that any defendant was in fact a perpetrator. It simply makes the point that in order for a defendant to aid and abet the commission of a crime, there must be someone who actually and directly committed the crime. A defendant cannot aid and abet a "perpetrator" who did not in fact commit a crime.

Further, instructions are not to be read in isolation. CALCRIM No. 400 was immediately followed by CALCRIM No. 401. CALCRIM No. 401 directly makes the point referenced above by Joynes. CALCRIM No. 401 states in pertinent part: "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime." We see no possibility that a jury would have disregarded this clear language.

Joynes also claims that the following sentence from CALCRIM No. 400 is erroneous: "A person is equally guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it."⁵ No defendant objected to this language in the trial court. We will assume for the sake of argument that the claim is not forfeited and the language is incomplete or misleading. We see no probability or possibility that Joynes was harmed by the instruction. The evidence showed Joynes as a full participant in the crimes committed in this case.

Joynes contends that the "equally guilty" language could have caused the jury to convict him of rape based on Guidry's rape of S., even if they determined that he was not involved in the rape, and did not



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intend for such a sex offense to occur and was far less culpable. By "less culpable," Joynes apparently means that he may have intended to commit his own act of orally copulating S., but "considered vaginal . . . rape to be off limits, and would not have participated or sanctioned such an offense."

Forcible oral copulation in violation of section 288a, subdivision (d)(1) is not a "lesser" crime than forcible rape in violation of section 261, subdivision (a)(1). In fact the penalty for forcible oral copulation in concert is 5, 7 or 9 years while the penalty range for forcible rape is 3, 6 or 8 years. Forcible oral copulation is a separate and distinct sexual offense from forcible rape.

To the extent that Joynes is attempting to argue that absent the "equally guilty" language, the jury might have found him less culpable of the rape than Guidry and convicted him of some sexual offense other than rape or even acquitted him, we do not agree. There is no evidence suggesting that Joynes found vaginal rape "off-limits" and refused to participate in it or sanction it. Joynes asked Reginald for condoms. When Reginald replied that he did not have any, Joynes exclaimed, "What? You don't fuck?" The most reasonable inference from this exchange is that Joynes viewed condoms as a part of vaginal intercourse and asked Reginald for condoms because he intended to have forcible vaginal intercourse (rape) with S., or to help a cohort do so. In addition, Joynes inserted an object into S.'s vagina, which demonstrates that he did not have an aversion to sexual offenses which involved vaginal penetration. There is no possibility that the jury would have convicted Joynes of a lesser offense than vaginal rape, or acquitted him absent the "equally guilty" language of CALCRIM No. 400.

Joynes also contends the jury might have convicted him of Guidry's and Webbs's robberies even if they believed that Joynes had "a lesser culpability because he did not personally use force or fear against any of those three victims, and did not take any personal property from them." The fact that a defendant does not personally use force or fear or take property does not make him less culpable of robbery than the perpetrators. A person can aid and abet a robbery in many ways, including acting as a look-out or providing transportation.

Further, Joynes broke into the victim's house with a group of armed men, including Guidry and Webbs. These men robbed Sandra, Irving, Christopher, Reginald, and S. There was strong evidence that Joynes himself demanded money and personal property from Reginald at gunpoint, and so directly participated in at least that one robbery. There is no possibility that the jury would have found Joynes guilty of a lesser offense than robbery of the other four victims absent the "equally guilty" language of CALCRIM No. 400.

3. Sufficiency of the evidence - rape

Joynes contends that there is insufficient evidence that a penis penetrated the victim's vagina and so insufficient evidence to support the rape conviction. Webbs and Guidry join in this contention. We see sufficient evidence.



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"In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence--evidence that is reasonable, credible and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." [Citation.] We do not reweigh evidence or reevaluate a witness's credibility. [Citations.]" (People v. Nelson (2011) 51 Cal.4th 198, 210.)

"The essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape. Any sexual penetration, however slight, is sufficient to complete the crime." (§ 263.) "Penetration of the external genital organs is sufficient to constitute sexual penetration and to complete the crime of rape even if the rapist does not thereafter succeed in penetrating into the vagina." (People v. Karsai (1982) 131 Cal.App.3d 224, 232, disapproved on other grounds by People v. Jones (1988) 46 Cal.3d 585, 600, fn. 8.)

Here, the victim testified: "He wasn't able to put his penis fully in my vagina." The prosecutor asked: "Did you feel some part of his penis up against your vagina?" The victim replied: "Yes." She also stated: "I felt [his penis] on the outer lips of my vagina." The victim also testified that she felt "pain towards where my vagina was." The prosecutor asked: "So is it your feeling that [your attacker] never got any part of his penis inside of your vagina?" The victim replied: "Just to the outer lips. Not really in." The prosecutor then asked: "Was it between the outer lips?" The victim replied: "Yes."

The victim's testimony, read as a whole, is sufficient to show that some slight penetration of her external genital organs took place. The external genital organs (the vulva) include "the labia majora, labia minora, clitoris, and the entrance to the vagina." (Webster's New World Dict. (3d college ed. 1991) p. 1498.) "Labia" means lips, the labia majora are the outer lips. The victim stated that the penis did not go "fully" into her vagina, which indicates some form of partial entry. She specifically testified that she felt the penis "between" her outer lips and felt pain "toward where [her] vagina was." We simply do not agree with appellant that this testimony does not show that the penis "entered between her labia."⁶

Appellant points to other evidence which he contends suggests that there was no penetration, including statements by the victim. Appellant is correct that the victim made statements like "his penis was against my labia" "maybe he was trying to hump me" and "he wasn't able to [force his penis into my vagina]." The victim was describing a changing situation, and these statements do not indicate that the attacker's penis never penetrated her labia. The victim's statements do show that the attacker's penis never penetrated her vagina, but vaginal penetration is not required.



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Appellant also points out, correctly, that the victim told the SART nurse and her father that her attacker "tried" to rape her. There is no reason to believe that the victim was aware of the legal definition of rape, and based on that was proclaiming that no slight sexual penetration had occurred. The victim may well have believed that she was not actually raped because no vaginal penetration occurred. The law defines rape more broadly.

Appellant also contends that the prosecutor and the trial court made comments which suggest that they did not believe that her testimony showed penetration. We do not agree with appellant's characterization of the argument, but in any event those comments are not evidence.

4. Sufficiency of the evidence - tying and binding

Webbs contends that there is insufficient evidence to support the jury's finding that a defendant engaged in "tying or binding of the victim or another person in the commission of the present offense" within the meaning of the "One Strike" law.

(§ 667.61, subd. (e)(5).) Guidry and Joynes join in this contention.⁷ Specifically, appellants contend that subdivision (e)(5) requires evidence that the tying or binding increased the victim's vulnerability and was done solely or primarily to facilitate the sexual assault.

We review the evidence in accordance with the usual rules on appeal, as set forth in section 1, ante.

Appellants contend that the tying or binding of the victim's brother and parents (collectively "relatives") did not increase the victim's vulnerability because tying up the relatives did not prevent them from protecting the victim.

Appellants are mistaken in asserting that the tying and binding circumstance requires evidence that the tying and binding increased the victim's vulnerability. The Legislature has already determined that the circumstances in subdivision (e) increase a victim's vulnerability. The circumstances were selected because they increase the victim's vulnerability. As the Fourth District Court of Appeal has explained in discussing the various circumstances set forth in subdivision (e), "The common theme of all these proscribed actions is clear: they increase the victim's vulnerability." (People v. Campbell (2000) 82 Cal.App.4th 71, 78.)

To the extent that appellants contend that the reasoning of Campbell requires evidence of actual increased vulnerability, appellants are mistaken. In that case, the Court was faced with the issue of whether tying a blindfold over the victim's eyes was "tying or binding" within the meaning of subdivision (e)(1). The Court first pointed out that "the increased vulnerability of a victim whose hands or feet (or both) are tied is immediately clear." (People v. Campbell, supra, 82 Cal.App.4th at p. 78.) The Court then held that blindfolding constituted "tying or binding" because it had the same effect on the victim as tying or binding her hands or feet. "In both instances the victim's ability to



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flee her attacker, to resist the assault, or to summon help is severely impaired." (Ibid.) We see nothing in this discussion to create a requirement that the People must prove that a specific act of tying or binding a person's hands or feet actually increased a victim's vulnerability. To the contrary, the Court pointed out that the "increased vulnerability" from tying hands or feet is "immediately clear." (Ibid.)

Even assuming for the sake of argument that there must be evidence of increased victim vulnerability due to the tying and binding, such increased vulnerability was shown in this case. Here, of course, it was not the victim's hands or feet which were bound, but those of the relatives, a situation which is expressly covered by subdivision (e)(1). Appellant contends that it was the fact that there were "various armed robbers throughout the house" which prevented the relatives from protecting themselves or S., not the tying or binding. The obvious answer to appellant's contention is the fact that the attackers, although armed, still decided to tie up the relatives. Thus, the attackers showed that they believed that the relatives were capable of interfering in the crime spree even though the attackers were armed. Even if the relatives could not or would not have directly intervened in the sexual assaults (or the robberies) because the attackers were armed, it is perfectly possible that they might have been able to summon help if they had not been tied up, and thereby have shortened the duration of the sexual assaults. (See *People v. Campbell*, supra, 82 Cal.App.4th at p. 78 [tying or binding "severely impair[s]" victim's ability to summon help].)

Appellants also contend that the tying and binding circumstance requires "a relationship between the aggravating factor and the target offense." They conclude that such a relationship is lacking because the evidence shows that the robbery was the "target offense," the tying and binding was done to facilitate the robbery and not the sexual offenses and so was not done "in the commission of" the sexual offenses. Appellants rely on *People v. Jones* (2001) 25 Cal.4th 98 to support this contention. Their reliance is misplaced.

Appellants are correct that our Supreme Court has stated that the phrase "used a weapon in the commission of the [sexual] offense," found in section 667.61, subdivision (e)(3), would have the same meaning as "in the commission of the offense" as used in section 12022.3. However, nothing in this analysis requires that a sexual offense be the "target" offense in order for subdivision (e) to apply, or requires that the primary or only purpose of the tying or binding be to facilitate the sexual offenses. As appellants acknowledge, the intent of the perpetrator in tying or binding is not dispositive. "[T]he statute does not refer at all to the attacker's objective in performing prohibited acts, and any such particular intention cannot be controlling. [Citation.]" (*People v. Campbell*, supra, 82 Cal.App.4th at p. 78.) Thus, we see no requirement that a criminal who ties or binds a victim or other persons during a crime spree which includes sexual and non-sexual offenses does so with the intent to threaten or maintain control of the victim during the sexual offenses. It is enough that the restraints are in place before, during or after the sexual offenses. (*People v. Jones*, supra, 25 Cal.4th at pp. 109-110 [weapons use would be "deemed to occur 'in the commission of' the offense if it occurred before, during, or after the technical completion of the felonious sex act"].) That was clearly the case here.



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5. Sufficiency of the evidence - robbery

Guidry contends that there is insufficient evidence to support the conviction for robbery of S. Webbs and Joynes join this contention. Specifically, appellants contend that no property was taken from S., and S. was in her bedroom the entire time, was not aware of the robberies going on in other parts of the house, and was not present when property was taken from her relatives. Appellants conclude that S. was not a robbery victim.

We review the evidence in accordance with the usual rules on appeal, as set forth in section 1, ante.

Robbery involves the felonious taking of personal property in the possession of another, from his person or presence and against his will, by means of force or fear.

(§ 211.) Two or more persons may be in joint constructive possession of one piece of property, making multiple convictions for robbery permissible. (People v. Scott (2009) 45 Cal.4th 743, 750.) As appellants acknowledge, the immediate presence requirement includes property that is in a different room from the owner at the exact moment that the robber takes control of the property.

Here, appellants have overlooked some key facts about the robberies. S. left her room while the invaders were finishing up their robbery of Reginald. Joynes walked up to her, put a gun to her head, and told her to go into her room and get on the floor. One of the invaders yelled at S., "Where's your money? Where's your jewels?" At that point, S. clearly knew that her family was being robbed and that she was one of the targets of the robbery. Later, S. was in the bathroom and saw Guidry leave, again showing her awareness of activities outside her room. Appellants took property which was jointly owned by the family, such as an antique phonograph. Thus, S.'s personal property was taken. This is sufficient evidence to support a conviction for the robbery of S.

6. Sufficiency of the evidence gang enhancement

Guidry contends that there is insufficient evidence to support the gang allegations to the sex offenses. Webbs and Joynes join this contention. Specifically, appellants contend that the sex offenses were a crime of opportunity which occurred during the planned robberies and were committed for personal sexual gratification, and so there is no evidence to show that the crimes were committed with an intent to further or promote the criminal activities of a gang.

We review the evidence in accordance with the usual rules on appeal, as set forth in section 1, ante.

Section 186.22, subdivision (b)(1) provides enhanced punishment for "a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members."



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We see sufficient evidence to show that the crimes were committed "for the benefit of, at the direction of, or in association with any criminal street gang." The prosecution's gang expert explained that gangs benefit from violent crimes such as those committed in this case because the crimes "create an atmosphere of fear and intimidation in the neighborhoods in which they claim." Appellants referred to each other as "Blood" throughout the crimes. Soon thereafter, Guidry and Joynes bragged to an associate Blood gang member about "getting head" from a robbery victim. Thus, appellants themselves took steps to make sure that people in the neighborhood knew that a gang was responsible for the sexual offenses against S.

There was also evidence that the crimes were committed "in association with" a criminal street gang. Appellants are all members of Blood-related gangs and called each other "Blood" during the crimes, and two of the three of them wore red. They spoke with each other via walkie-talkies throughout the crime, and discussed their activities with each other.

There is also sufficient evidence that the crimes were committed to "promote, further, or assist" in criminal conduct by gang members. Appellants' contention that there is insufficient evidence of the requisite intent rests on *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, which requires an intent to benefit criminal conduct by the gang "apart from" the charged crimes. As the California Supreme Court has now explained, "the scienter requirement in section 186.22(b)(1) - i.e., 'the specific intent to promote, further, or assist in any criminal conduct by gang members' - is unambiguous and applies to any criminal conduct, without a further requirement that the conduct be 'apart from' the criminal conduct underlying the offense of conviction sought to be enhanced." (*People v. Albillar* (2010) 51 Cal.4th at 47, 66, italics added.)

The Court in *Albillar* held that "if substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*Id.* at p. 68.) Here, the evidence showed that all three appellants were gang members and referred to each other as "Blood" and that some men involved in the attacks wore red clothing. Thus, it was fair for the jury to find that each appellant knew the other was a gang member, and to infer that each appellant had the specific intent to promote, further or assist the criminal conduct of the other. That is sufficient.

Appellants also contend that the evidence shows that they committed the crimes to satisfy their own personal sexual desires. Nothing in the law precludes dual intents. (See *People v. Liu* (1996) 46 Cal.App.4th 1119, 1135-1136; see also *People v. Albillar*, supra, 51 Cal.4th at p. 61 [acknowledging that gang members have a personal interest in having sex with the victim as well as the intent to promote, further or assist criminal conduct by other gang members].) Thus, appellants may well have intended to satisfy their own sexual desires in addition to promoting, further or assisting criminal conduct by other gang members.



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7. Robbery sentences

Guidry contends that the trial court erred in imposing a term of 16 years to life in prison for each robbery conviction, plus a 10-year firearm enhancement per count. He contends that it is not clear which sentencing scheme the trial court was using in imposing this sentence, and speculates that the court improperly used section 667.61, the One Strike law. Joynes and Webbs join in this contention.

We agree that the One Strike law does not apply to robberies. We see no indication that the trial court relied on that law, however.

The prosecutor's sentencing memorandum referred to "Penal Code § 86.22 (b)(1)(C)(4)." Since the jury found true the allegations that the robberies were committed for the benefit of a criminal street gang within the meaning of section 186.22, it seems certain that the prosecutor was referring to that section. This is particularly true since subdivision (b)(1)(C) provides the determinate enhancement term for serious felonies while, subdivision (b)(4) provides an alternate sentencing scheme which applies when a defendant commits certain specified crimes, including home invasion robbery, for the benefit of a criminal street gang.

We have no doubt that the trial court used the sentencing formula advocated by the prosecutor. Under subdivision (b)(4), a defendant is sentenced to an indeterminate term of life in state prison. The subdivision provides that the minimum term is the greater of (1) the sentence as calculated under section 1170 for the underlying conviction, including enhancements or (2) 15 years. The mid-term for a home invasion robbery is 6 years, while the applicable determinate gang enhancement for serious felonies, including robbery, is 10 years, for a total of 16 years. (§ 213; § 186.22, subd. (b)(1)(C).)

Guidry also contends that the trial court erred in adding 10-year firearm enhancements to the 16 year-to-life robbery convictions.⁸ There was no error. (People v. Brookfield (2009) 47 Cal.4th 583, 590.)

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

We concur: MOSK, J. KRIEGLER, J.

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

2. Specifically, Webbs contends that there is insufficient evidence of the tying and binding and robbery, Joynes insufficient evidence of the rape and Guidry insufficient evidence of the gang allegation. They each join in the others' contentions.



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3. Guidry raises no claim of error involving his conviction for a second robbery committed on June 13, 2008, and so a detailed recitation of the facts of that offense are omitted. In summary, Guidry stopped a 15 year old boy walking alone near Crenshaw Boulevard and 67th Street, asked him where he was from and if he was from the Hoover gang. The boy gave Guidry his wallet and Guidry told the boy to get out of his "hood." Guidry then rejoined his companions who were waiting across the street.

4. Alternatively, it is possible that by "community time" Juror No. 278 meant probation. In that case, at the completion of probation, she was eligible to have her conviction reduced to a misdemeanor and expunged pursuant to section 1203.4. While an expungement is a judicial act and a pardon a legislative act, expungements are similar to pardons in their effect and it would be reasonable for Juror No. 278 to have confused the two. An expungement is not the rarity that a pardon is.

5. Guidry and Webbs each make a general statement of joinder in this claim, but no specific argument about how the instruction harmed him. Joynes's argument is not factually applicable to them. Accordingly, their claims fail.

6. It is possible that Joynes is arguing that the evidence does not show that the penis was between her major and minor labia (outer and inner lips), that is that it went past her outer lips and between her inner lips, just to the entrance of her vagina. This was the fact scenario in Karsai, supra, but nothing in that opinion sets penetration all the way up to the entrance of the vagina as a requirement.

7. We note that even if we were to find insufficient evidence of the tying and binding circumstance, it would not affect Guidry's and Joynes's sentence, since two valid circumstances would remain for them. That is not the case for Webbs. Absent the tying and binding finding, the 25-year minimum term of the One Strike law would not apply to him.

8. Although Webbs joins in this contention, he was sentenced under a different subdivision of section 12022.53 than Guidry, and so Guidry's contention is not applicable to him. Webbs makes no separate argument related to the facts of his sentencing.

