Court of Appeal, Second Appellate District, Division Five - No. B287499

S252618

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

CESAREO VIZCARRA MEDINA, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

Filed 10/16/2018

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. CESAREO VIZCARRA MEDINA, Defendant and Appellant.	B287499 (Los Angeles County Super. Ct. No. VA140440)

APPEAL from judgment of the Superior Court of Los Angeles County, Roger Ito, Judge. Reversed in part, affirmed in part, and remanded with directions.

Brad Kaiserman, under appointments by the Court of Appeal, for Defendant and Appellant.

EXHIBIT A

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven E. Mercer, Acting Supervising Deputy Attorney General, Eric J. Kohm, Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendant and appellant Cesareo Vizcarra Medina guilty of first degree burglary (Pen. Code, § 459 [count 1]),[1] two counts of forcible oral copulation (§ 288a, subd. (c)(2)(A) [counts 2 and 5]), sexual penetration by foreign object of a minor over 14 years of age (§ 289, subd. (a)(1)(C) [count 3]), and two counts of attempted forcible rape (§§ 664, 261, subd. (a)(2) [counts 4 and 6]). As to the oral copulation and penetration with a foreign object counts, the jury found true the special allegation that the victim was a child between 14 and 18 years of age. (§ 667.61, subds. (d) & (l) [counts 2, 3, and 5].) It also found true the special allegations that the victim was under 18 years of age in the

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

attempted forcible rape counts.[2] (§ 264, subd. (c)(2) [counts 4 and 6].)[3]

The court selected count 4 (attempted rape) as the principal determinate count. (§§ 664, 261, subd. (a)(2).) The court imposed the middle term of 54 months and stated that was "the sole determinate term sentence that this court intends on imposing." As to count 2 (oral copulation), count 3 (penetration with foreign object), and count 5 (oral copulation) with attached enhancements for an underage victim, the court imposed three consecutive sentences of life without the possibility of parole. It imposed a sentence of 66 months in count 6 (attempted rape) to run concurrently with the sentence in count 4. The court stayed the sentence in count 1 (burglary) pursuant to section 654.

Medina contends that (1) count 6 for attempted forcible rape must be reversed because there is insufficient evidence to support the jury's verdict; (2) the prosecutor committed misconduct in her opening statement and closing argument; (3) he had inadequate notice of the special allegations that

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[2] The information did not include the special allegations under section 264, subdivision (c)(2); however, the jury was instructed regarding the allegations, which were included on the verdict forms.

[3] The information alleged that Medina had served a prior prison term within the meaning of section 667.5, subdivision (b) as to all counts, but there is no indication in the record that a trial was held on the prison priors or that a sentence was imposed under section 667.5, subdivision (c)(2).

the victim was between the age of 14 and 18 years old at the time of the offenses in counts 4 and 6; and (4) the cause must be remanded for the court to address sentencing discrepancies in count 6. He argues that if this court concludes his claims were forfeited because trial counsel failed to object to the prosecutor's statements, the inclusion of the special circumstances in the instructions and verdict forms, and the imposition of increased terms on the basis of the special circumstances, counsel rendered ineffective assistance.

We reverse as to one of the attempted forcible rape convictions and remand to the trial count to determine whether to strike count 4 or count 6. In all other respects the judgment is affirmed.

FACTS

Prosecution

In May 2015, when Daisy, the victim, was 17 years old, she lived with her mother in an apartment in a converted garage behind a residence. Daisy's brother-in-law's family, including Medina, lived in the home in front of her apartment until March of 2015. Daisy only knew a few of them by name. Medina's daughter and Daisy went to the same school so he drove Daisy to school a few times with his daughter.

At approximately 7:30 a.m. on May 4, 2015, Daisy was alone in the apartment getting ready for school when someone knocked on the door. Daisy could not see who was at the door, but she opened it because she thought it might be the girls who lived in the front house.

A man later identified as Medina was standing in the doorway with a sweater over his head concealing his face. Daisy was afraid and backed away. The man asked if her mom was home. When she heard his voice she knew it was Medina.

Daisy did not respond. She backed up and dropped to the floor. Medina picked her up. She yelled for help. He covered her mouth and ordered her to turn off the lights.

After Daisy turned off the lights, Medina dragged her to her mother's bedroom at the back of the apartment. He tried to pull her pants down but it was difficult because she was wearing shorts under her jeans. To trick him, Daisy said she would do it. She tried to kick Medina in his groin and run, but she missed and kicked his leg.

Medina threw Daisy on the bed and pulled down her pants and shorts. He penetrated her vagina with his fingers and placed his mouth on her vagina. Daisy was crying and yelling. Medina covered her face.

Medina lifted Daisy's shirt and put his mouth on her breasts. Afterwards, he tried to penetrate her vagina with his penis, but was unable to because it was flaccid. He forced his penis into her mouth and told her to "suck it." Daisy said she did not want to. Medina masturbated and

continued to force his penis into her mouth, making her choke.

After Medina took his penis out of Daisy's mouth, she cried very loudly. Medina told her to shut up. He picked her up and slapped her head. Daisy was not sure if Medina tried to penetrate her a second time.[4] She had her hand over her eyes. Medina asked Daisy for lotion. He picked her up and dragged her to the bathroom to look for it.

Medina did not find the lotion. He slapped Daisy so hard that he knocked her to the ground. He ordered her to get under the bed, but the bed was so low that she could not crawl under it. He picked up the bed and made Daisy crawl under it. Then he dropped the bed and told her that if she "followed him he'd fuck [her] up." Daisy said she would not say anything. Medina left the apartment.

Daisy climbed out from under the bed, grabbed "something sharp" from the kitchen, and locked the door to the apartment. She went back to the bathroom, locking all the doors on the way behind her.

She tried to call her mother, but there was no answer. She called her father, but she was crying so hard that he could not understand her and hung up. She called her sister

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[4] When asked "Did he try to have sex with you again?" at trial, Daisy responded, "No. Or I think he did. I really don't remember." When asked if there was another occasion in which he tried to put his penis in her vagina she testified, "I think so. Maybe. I really don't remember . . . I had my hand over my eyes because I didn't want to look."

Claudia in Arizona and screamed "I was raped!" Claudia told Daisy to call 911.

Daisy called 911. A recording of the call was played for the jury. During the call she said someone tried to rape her. She did not know Medina's name, but she told the operator that she thought her attacker was married to her brother-in-law's cousin. She described to the 911 operator how Medina removed her pants and had his face covered during the incident.

The Investigation

Los Angeles County Sheriff's Department Deputy Eneida Montano responded to Daisy's apartment. When she interviewed Daisy, Daisy stated that Medina's penis was erect during the assault. She did not say she could see Medina's eyes. Deputy Montano transported Daisy to the hospital.

At the hospital, nurse Jennifer Rivera examined Daisy and completed a Sexual Assault Response Team ("SART") kit. Rivera did not find any injuries on Daisy's body. Rivera gave the SART kit to Deputy Montano.

The next day, Los Angeles County Sheriff's Department Detective Cynthia Toone interviewed Daisy. Daisy told her Medina had given her a ride to school a few times. She did not mention being in his car by herself or speaking to him alone about three weeks before. Daisy said that she never saw her attacker's face. She thought Medina

attacked her based on his voice and the fact that he knew the property well and knew her mother's work schedule. Daisy described the attack.

Los Angeles County Forensic Identification Specialist Jackie Thompson searched for fingerprints on several of the doors in Daisy's apartment. She found a fingerprint on the bathroom door. Thompson entered it into the Automated Fingerprint Identification System and determined that the print matched fingerprints for Medina that were already in the system.

Los Angeles County Senior Criminalist Vanessa Esparza examined the evidence in the SART kit for semen and saliva. She found saliva in the samples taken from Daisy's breast and mouth, semen and saliva in the external anal sample and vulva sample, and semen in the vaginal sample.

Detective Toone obtained a buccal swab sample from Medina for DNA analysis. Los Angeles County Senior Criminalist Jill Soumas analyzed all of the samples from Daisy's body for the presence of DNA. She concluded that Medina's DNA was in the breast, anal, and vaginal samples.

Defense

Laura Arredondo was Medina's wife. She testified that Daisy asked her for a ride to school approximately 10 times. Medina would sometimes drive Daisy to school with their

daughters. Arredondo saw Daisy speak with Medina alone to ask for a ride. Daisy also spent time in their home.

On one occasion, Arredondo saw Medina drop Daisy off a block away from their house. There was no one else in the car, and Medina drove away after Daisy got out.

Rigoberto Arredondo was Medina's brother-in-law. He testified that in March 2015, he saw Medina watching a movie with Daisy. No one else was in the room.

Arredondo was in the front house on the date of the incident. He did not hear anything unusual.

Prosecution's Rebuttal

Detective Toone interviewed Medina. A recording of the interview was played for the jury. Medina stated that Daisy lived in the house behind his. He admitted that he knew her, and she went to school with his daughter. He occasionally took Daisy to school with his daughter, but he did not really speak with her.

DISCUSSION

Sufficiency of the Evidence

Medina contends there was insufficient evidence to support his conviction of one of the attempted forcible rape counts. He argues that the 66-month sentence in count 6 must be reversed. We agree that one of the attempted

forcible rape convictions must be reversed. However, neither the information nor the verdict forms indicate which alleged instance of attempted forcible rape was associated with each of the individual counts, and different sentences were imposed. We therefore reverse as to one of the rape convictions and remand to the trial court to determine which count is to be stricken.

"When we review a challenge to the sufficiency of the evidence to support a conviction we apply the substantial evidence standard. Under that standard the reviewing court examines the entire record to determine whether or not there is substantial evidence from which a reasonable jury could find beyond a reasonable doubt that the crime has been committed. In reviewing that evidence the appellate court does not make credibility determinations and draws all reasonable inferences in favor of the trial court's decision. We do not weigh the evidence but rather ask whether there is sufficient reasonable credible evidence of solid value that would support the conviction. (*People v. Johnson* (1980) 26 Cal.3d 557, 576–578.)" (*People v. Russell* (2010) 187 Cal.App.4th 981, 987–988.)

"An attempt to commit a crime has two elements: the intent to commit the crime and a direct ineffectual act done toward its commission. The act must not be mere preparation but must be a direct movement after the preparation that would have accomplished the crime if not frustrated by extraneous circumstances." (*People v. Carpenter* (1997) 15 Cal.4th 312, 387 (*Carpenter*), abrogated

on other grounds in *People v. Diaz* (2015) 60 Cal.4th 1176, 1189.)

In this case, there is insufficient evidence to support the verdict on the rape count based on the second alleged instance of attempted forcible rape. Daisy testified that she "thought" Medina tried to rape her a second time, but that she was not sure and could not remember. We assume her testimony was truthful, but it nevertheless fails to support the conclusion that Medina made the second attempt—Daisy simply could not remember what happened. (See *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1085–1086 [evidence was insufficient to support conviction for willful infliction of corporal injury resulting in a traumatic condition where victim testified she did not know whether she suffered injuries as a result of the offense].)

The fact that Medina went to the bathroom to look for lotion is not sufficient evidence to support the conviction for the alleged second instance of attempted forcible rape. Although a reasonable person could infer Medina's search for lotion was in preparation for rape, preparation alone is not sufficient to support the verdict. Attempted rape requires "a direct movement after the preparation that would have accomplished the crime if not frustrated by extraneous circumstances." (*Carpenter*, *supra*, 15 Cal.4th at p. 387 [defendant pointing a gun at the victim after stating that he wanted to rape her was sufficient evidence of attempted rape].) We reverse as to one of the rape convictions and

remand to the trial court to determine which count is to be stricken in the first instance.

Prosecutorial Misconduct

Medina contends the prosecutor committed misconduct in her opening statement and closing argument by impermissibly appealing to the juror's emotions and vouching for Daisy's credibility. He concedes that trial counsel did not object during argument, but notes that the issue was raised in his motion for new trial. Alternatively, he argues that if the issue is deemed waived, counsel was ineffective for failing to object.

Generally, a defendant may not complain of prosecutorial misconduct on appeal unless counsel timely objected and requested an admonition. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Arguments of prosecutorial misconduct in a motion for new trial do not substitute for a timely objection. (*People v. Williams* (1997) 16 Cal.4th 153, 254.)

Medina forfeited the argument by failing to raise it below. Because he alternatively argues that trial counsel was constitutionally ineffective for failing to timely object, however, we address the merits.

On the record before us, we cannot conclude that defense counsel's omissions constituted ineffective assistance. The record contains no explanation for counsel's inaction, and there are reasonable considerations that may

have driven his decision. Moreover, it is not reasonably probable that the outcome would have been more favorable to Medina if trial counsel had objected. Given the strength of the evidence against him, we cannot say he was prejudiced by his counsel's performance.

Proceedings[5]

Prosecutor's Opening Statement

In her opening statement, the prosecutor told the jury, "*Daisy was 17 years old when she endured a woman's worst nightmare.*" Defense counsel did not object. The prosecutor then described how Medina dragged Daisy around the house, sexually assaulted her in multiple ways as she kicked and yelled for help, hit her, and threatened to "fuck [her] up."

Prosecutor's Closing Argument

In closing argument, the prosecutor played the recording of Daisy's 911 call and then stated:

> "*Daisy made that call just minutes after she experienced, endured this assault, this horrific assault by the defendant.*

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[5] The statements Medina challenges are italicized.

"*The emotion in that call is real. It's palpable. We can feel it, just like we felt Daisy's emotions when she testified from that witness stand last week. That is the evidence, ladies and gentlemen.* That call, the testimony from that witness stand. *If you felt yourself getting upset during that call, if you felt yourself getting upset during Daisy's testimony, it's only natural, because all of us in this courtroom could feel what Daisy went through. We could feel her pain as she recounted every detail of that incident.*"

Soon afterward the prosecutor explained:

"*Why do I point out Daisy's emotion? Not to appeal to your emotions improperly, but because that is the evidence. Because Daisy is so credible.* We can't ignore the natural human reaction coming from Daisy when she testified here last week."

She summarized her point: "*Daisy was so credible.* Daisy's emotion was so real on the stand. She wasn't overly emotional. She wasn't sobbing throughout her testimony. She cried at appropriate times. . . . She became tearful when she was describing the sexual acts, the abuse perpetrated by the defendant on her."

Later, the prosecutor reiterated: "Daisy's emotion was real. She was consistent. She was clear. She never wavered. . . . *It's hard for us to imagine a more traumatic experience for a 17-year-old girl.*"

Defense counsel did not object to any of the above statements, although he argued that the prosecutor's misconduct in oral argument prejudiced Medina in defendant's motion for new trial.

Defendant's Closing Argument

Defense counsel emphasized that the jurors were not to decide the charges on the basis of emotion, but to focus on the evidence:

> "But the problem is you're asking the wrong question. If you're asking me how do I feel, you're asking me for my emotion about the case. The real question you should be asking me is what do you think?"

He indicated that the prosecutor "focused on all the emotions," by beginning argument with the recording of the 911 call in which she was crying. He reminded the jurors that when empaneling the jury the attorneys had stressed that "we need you to be able to separate the emotional aspect from the critical thinking aspect." Despite this, the prosecution "spent the first eight minutes talking about the emotional aspect of the case." The emotion is "the evidence that they want you to accept." Defense counsel stated that "my biggest concern is that the jury is going to weigh this case by how they feel versus what do they think about it.

But I'm not worried. I'm not worried because, you know, the evidence and the testimony came out just as we expected it."

The prosecutor objected to this argument on the ground that it was "improper vouching." The court admonished that what the attorneys said in argument was not evidence.

Defense counsel pointed out a perceived discrepancy in Daisy's testimony and then argued: "See the difference between getting caught up in the emotion and analyzing the facts?" He warned, "Don't get caught up in the emotion, even [though] the prosecution gets caught up in the emotion."

"You made a promise to us that you would not allow the emotion to control your decision-making, that you would utilize critical thinking, your common sense, you would evaluate the evidence and the testimony."

Prosecutor's Rebuttal

In rebuttal, the prosecutor reminded the jury that they were "objective evaluators of the facts," and emphasized that the attorneys' arguments were not evidence.

With respect to the 911 call recording, she argued:

> "[I]t's understandable why the defense doesn't like this piece of evidence, because it's so compelling, but it's evidence. It is not emotion. It is facts. It is evidence. It is a very compelling piece of evidence.

> "I'm not appealing to your emotion when I give you a piece of evidence. I don't make the evidence. The evidence speaks for itself. So I'm not asking you to feel sad or sorry when you hear evidence. That is someone else's emotion. That is the victim's emotion, not any of our emotion."

The prosecutor asserted that Daisy's actions supported her testimony that the sexual acts were not consensual:

> "[T]he glaring problem with the defense's position, first of all, why did she call 911? Why would she tell on herself? It makes no sense. And you'll notice that they didn't address that because there's no other explanation. She's home alone. There's nobody there. There's no danger of being 'caught' as they say. Why did she call 911? Why is she sobbing on the 911 call?"

She implored the jury to "convict [Medina] not based on emotion, but because that is what the evidence proved . . . ."

Analysis

Ineffective Assistance of Counsel

"To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective

standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003 (*Cunningham*), citing *Strickland v. Washington* (1984) 466 U.S. 668, 687–694 (*Strickland*).) "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' (*Strickland*[, *supra*,] at p. 694; *People v. Riel* (2000) 22 Cal.4th 1153, 1175.)" (*Cunningham*, *supra*, at p. 1003.)

"The Sixth Amendment guarantees competent representation by counsel for criminal defendants[, and reviewing courts] presume that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions." (*People v. Holt* (1997) 15 Cal.4th 619, 703, citing *Strickland*, *supra*, 466 U.S. at p. 690; *People v. Freeman* (1994) 8 Cal.4th 450, 513.) "A defendant who raises the issue on appeal must establish deficient performance based upon the four corners of the record. 'If the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal.' [Citations.]" (*Cunningham*, *supra*, 25 Cal.4th at p. 1003, citing *People v. Kraft* (2000) 23 Cal.4th 978, 1068–1069; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–

267.) The decision to object to the admission of evidence is tactical in nature, and a failure to object will seldom establish ineffective assistance. (*People v. Williams* (1997) 16 Cal.4th 153, 215.) Given the presumption of reasonableness proper to direct appellate review, our Supreme Court has "repeatedly emphasized that a claim of ineffective assistance is more appropriately decided in a habeas corpus proceeding. [Citations.] The defendant must show that counsel's action or inaction was not a reasonable tactical choice, and in most cases ""the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged . . . ."" [Citations.]" (*People v. Michaels* (2002) 28 Cal.4th 486, 526.)

Prosecutorial Misconduct

"Prosecutors are given """"wide latitude""""" in trying their cases. ([*People v.*] *Hill*[(1998)]17 Cal.4th 800, 819 [(*Hill*)] [wide latitude given in closing argument].) 'The applicable federal and state standards regarding prosecutorial misconduct are well established.' (*People v. Samayoa* (1997) 15 Cal.4th 795, 841 (*Samayoa*).) Under federal constitutional standards, a prosecutor's ""intemperate behavior"" constitutes misconduct if it is so """"egregious""""" as to render the trial 'fundamentally unfair' under due process principles. (*Ibid.*) Under state law, a prosecutor commits misconduct by engaging in deceptive or reprehensible methods of persuasion. (*Ibid.*) Where a

prosecutor has engaged in misconduct, the reviewing court considers the record as a whole to determine if the alleged harm resulted in a miscarriage of justice. (*People v. Duncan* (1991) 53 Cal.3d 955, 976–977.) In considering prejudice 'when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]' (*Samayoa, supra*, 15 Cal.4th at p. 841.)" (*People v. Caldwell* (2013) 212 Cal.App.4th 1262, 1269 (*Caldwell*).)

"It is settled that '[a] prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record. [Citations.] Nor is a prosecutor permitted to place the prestige of [his or her] office behind a witness by offering the impression that [he or she] has taken steps to assure a witness's truthfulness at trial. [Citation.] However, so long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the "facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief," [his or her] comments cannot be characterized as improper vouching. [Citations.]' (*People v. Frye* (1998) 18 Cal.4th 894, 971.)" (*Caldwell, supra*, 212 Cal.App.4th at pp. 1269–1270.)

It is also improper for the prosecutor "to appeal to the passions and prejudices of the jury." (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1342 (*Seumanu*); see also *People v.*

Fields (1983) 35 Cal.3d 329, 361–363 [prosecutor committed misconduct in closing argument when prosecutor "invited the jury to depart from their duty to view the evidence objectively, and instead to view the case through the eyes of the victim," by asking jurors to think of themselves as the victim and to imagine being threatened, tied down, and shot twice by defendant].) In other words, it is misconduct for the prosecutor to "suggest 'that emotion may reign over reason' or invite 'an irrational, purely subjective response.' [Citation.]". (*Seumanu*, *supra*, at p. 1343.)

This Case

Here, there is nothing in the four corners of the record to indicate defense counsel's motivation for his tactical decisions, which is reason enough to reject the issue on direct appeal. It would have been reasonable for defense counsel to opt not to object, however. The prosecutor's comments were not improper and counsel is not ineffective for failing to object absent a basis for objection. (*People v. Hines* (1997) 15 Cal.4th 997, 1055 (*Hines*).) Even if the prosecutor's comments had been improper, there were tactical reasons that counsel could have elected not to object.

Daisy's credibility was of central importance to the prosecution of this case. Medina argued that he was not guilty because any sexual conduct between himself and Daisy was consensual. Daisy's testimony directly countered Medina's defense. The prosecutor argued that Daisy's

credibility was bolstered by her emotional reaction in the 911 recording—a woman who had been the victim of the crimes Daisy suffered would naturally react emotionally after experiencing such nightmarish events. Nothing in her argument went beyond the facts presented at trial. It was undisputed that Daisy was 17 years old when the offenses occurred. The evidence that she was slapped, dragged, sexually assaulted, and threatened, all support the conclusion that the experience was traumatic. The remark that the crimes were "every woman's worst nightmare" was a fair comment on the events that transpired. Even if the prosecutor had overstated the severity of the crime, "[u]sing colorful or hyperbolic language will not generally establish prosecutorial misconduct." (*People v. Peoples* (2016) 62 Cal.4th 718, 793.) The prosecutor did not ask the jurors to imagine themselves in Daisy's position or to relive the crimes through her eyes; rather, the prosecutor argued that they should pay attention to Daisy's own demeanor on the 911 call and in giving her testimony when evaluating her credibility.[6] The prosecutor reminded the jury that she was emphasizing Daisy's emotions not to appeal to its sympathy,

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[6] Defendant seizes upon the prosecutor's use of the word "feel" to suggest the jury was asked to view the case improperly through the eyes of the victim. Defendant mischaracterizes the prosecutor's argument. The prosecutor was making a fair comment on the evidence, no different than arguing that one could "hear" Daisy's emotion and pain in her testimony and the 911 call.

but to show that her behavior was consistent with her testimony. The prosecutor did not suggest "'that emotion [should] reign over reason' or invite 'an irrational, purely subjective response.' [Citation.]" (*Seumanu, supra*, 61 Cal.4th at p. 1343.) Viewed in the context of the prosecutor's entire argument, "'there is [not] a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]' (*Samayoa, supra*, 15 Cal.4th at p. 841.)" (*Caldwell, supra*, 212 Cal.App.4th at p. 1269.) Because the prosecutor's comments were not improper, counsel was not ineffective for failing to object to them. (*Hines, supra*, 15 Cal.4th at p. 1055.)

Tactically, defense counsel may have determined that the best strategy for combating the substantive content of Daisy's testimony and the 911 call was to let the prosecutor emphasize Daisy's emotions, to characterize the People's case as based solely on emotions, and to argue that it would be unjust for the jury to base its verdict on emotions, and instead focus the jurors' attention on facts that supported Medina's case. Defense counsel's closing argument was replete with arguments that concentrated on logic and dismissed emotion as a basis for conviction. Such a strategy falls within the realm of reasonable representation. On this record, we cannot say there is no satisfactory explanation for counsel's decision.

Finally, Medina has not established prejudice. Overwhelming evidence supported Daisy's version of events. Medina did not contest that the incident with Daisy involved

sexual activity or that she was under the age of 18. The only question was whether Daisy consented to the activity. There was ample evidence that she did not. When police interviewed Medina he claimed to have had very little contact with Daisy. He told detectives he knew that she went to school with his daughter and he occasionally drove both girls to school or picked them up. He did not know Daisy's last name or her mother's name. He did not talk to her other than to say hello or goodbye. He claimed to have never been in Daisy's house. Daisy testified that she did not know Medina well. She consistently asserted that the encounter was not consensual—Medina sexually assaulted her. In the recording of the 911 call Daisy reported that Medina tried to rape her, which corroborated her trial testimony. Her emotion when she called her father, sister, and the 911 operator was consistent with the expected reaction of a person who had just been sexually assaulted. Evidence was presented to suggest that it was highly unlikely that Daisy and Medina would be discovered if they had been meeting secretly. Her mother was at work at the time the offenses took place. Under the circumstances, it would not have made sense for Daisy to report Medina's behavior to the police because there was no immediate danger that they would be caught. In light of the evidence, there is not "a reasonable probability that defendant would have obtained a more favorable result" if counsel had objected to the prosecutor's statements. (*Cunningham, supra*, 25 Cal.4th at p. 1003.)

Notice of Special Allegations

Medina contends that the matter must be remanded as to the attempted rape counts (counts 4 and 6) because the special circumstance that the victim was between 14 and 18 years of age at the time of the offense (§ 264, subd. (c)(2)) was not alleged in the information, depriving him of the constitutional right to notice of the charges against him.[7] Should the court find the issue waived because trial counsel failed to object to the instructions, verdict forms, and sentence, as the Attorney General urges, Medina argues that his counsel provided ineffective assistance.

Section 264 sets forth the punishment for rape: "(a) Except as provided in subdivision (c), rape, as defined in Section 261 or 262, is punishable by imprisonment in the state prison for three, six, or eight years." Subdivision (c)(2) provides: "Any person who commits rape in violation of paragraph (2) of subdivision (a) of Section 261 upon a minor who is 14 years of age or older shall be punished by imprisonment in the state prison for 7, 9, or 11 years." Attempted rape is punishable by imprisonment in the state prison for one-half the term of imprisonment prescribed upon a conviction of rape. (§ 664, subd. (a).)

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[7] Although one of the attempted rape counts will be stricken on remand, our analysis applies regardless of which count stands.

We agree with the Attorney General that Medina forfeited this issue by failing to object in the trial court. The court discussed the instructions with counsel multiple times during trial. The instructions included CALCRIM No. 3222, which advised the jury that as to counts 2 through 6, if it found Medina guilty of one or more of the crimes beyond a reasonable doubt, it must then determine whether the victim was between the ages of 14 and 18 years old at the time the crimes occurred, and to determine whether Medina knew or reasonably should have known the victim was between the ages of 14 and 18 years old. It further instructed that the jury must return a special finding for each crime. Counsel did not object, and the instruction was given to the jury.

The verdict forms in counts 4 and 6 included the allegation that the victim was a child between the ages of 14 and 18 years old. The jury found the allegation true as to both counts. There is no objection to the verdict forms contained in the record, and Medina does not claim that counsel made an objection.

The People's sentencing memorandum requested that the court sentence Medina to the upper term of 66 months for attempted forcible rape in count 4 pursuant to section 264, subdivision (c)(2) plus a consecutive term of 18 months—one-third of the midterm prescribed under the same subdivision—in count 6.

At sentencing, the prosecutor stated, "[f]or a minor who is 14 years of age or older Penal Code section 264 states that the triad is seven, nine or 11 years for a conviction of

[section] 261[, subdivision] (a)(2). So it would be half of that for an attempt." The court then imposed one-half the upper term in count 6 and a concurrent one-half of the middle term in count 4.[8] Defense counsel did not object at the sentencing hearing.

Under these circumstances, Medina has forfeited his claim. (See *People v. Houston* (2012) 54 Cal.4th 1186, 1229.) Regardless, he cannot establish ineffective assistance of counsel, because he has not demonstrated that he suffered prejudice as a result of counsel's failure to object. If trial counsel had objected the prosecutor would have moved to amend the information to include the special circumstances that were omitted in counts 4 and 6. Counts 2, 3, and 5 all included allegations that the victim was a child under 18 years of age, which the prosecutor had the burden to prove at trial. The prosecution offered evidence that Daisy was 17 at the time of the incident, which the defense did not dispute. Medina does not explain how his defense would have been different had the enhancement been included in the information, and thus has not shown prejudice.

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[8] Although the parties question the propriety of the trial court's oral pronouncement with respect to its designation of the principal count as we discuss below, they agree that the court based its sentencing determination on the penalty triad set forth in section 264, subdivision (c)(2).

Sentencing Error

The middle term for rape under section 261, subdivision (a)(2) with the special circumstance that the victim was between the ages of 14 and 18 at the time of the offense is 9 years, and the upper term is 11 years. (§ 264, subds. (a) & (c)(2).) Attempted offenses are punished at half the term of completed offenses (§ 664, subd. (a)), such that the midterm sentence is 54 months and the upper term is 66 months. Under *People v. Miller* (2006) 145 Cal.App.4th 206, at pages 215 to 216, "section 1170.1, subdivision (a) . . . provides that the trial court must designate as the principal term the longest term actually imposed by the court."

At the sentencing hearing, the trial court selected count 4 for attempted rape as the principal term and imposed a middle term of 54 months in prison. It then imposed the "full term" of 66 months in prison for attempted rape in count 6 to run concurrently. The minute order and abstract of judgment reflect that the court selected count 4 as the principal count, but incorrectly identify the 66-month sentence as the middle term.

Medina contends that this court must remand for the trial court to address the discrepancies in count 6—i.e., to clarify whether it intended to impose the upper term of 66 months or the middle term of 54 months. The Attorney General asserts that remand is unnecessary because the trial court orally imposed a sentence of 66 months in count 6, and erred only insofar as it failed to designate count 6 as the

principal count, which may be corrected by this court without remand.

Because we are remanding for the trial court to reverse one of the attempted forcible rape convictions, we need not address this issue. The trial court will impose only one determinate term at resentencing and will have the opportunity to determine whether to impose the upper or middle term at that time.

DISPOSITION

We reverse as to one of the attempted forcible rape convictions and remand to the trial count to determine whether to strike count 4 or count 6. In all other respects the judgment is affirmed.

MOOR, J.

We concur:

BAKER, Acting P.J.

SEIGLE, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

PROOF OF SERVICE

I, the undersigned, declare that I am a resident or employed in Los Angeles County, California; that I am over the age of eighteen years; that my business address is Brad K. Kaiserman, Esq., 5870 Melrose Ave., # 3396, Los Angeles, CA 90038, bradkaiserman@gmail.com, at whose discretion I served the document entitled **PETITION FOR REVIEW**

On November 17, 2018, following ordinary business practice, service was placed in a sealed envelope for collection and mailing via United States Mail, addressed as follows:

The Honorable Roger Ito
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c/o Erika Zavala
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California Appellate Project
Los Angeles Office
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Los Angeles, CA 90071

This proof of service is executed at Los Angeles, California, on November 17, 2018.

I declare under penalty or perjury that the foregoing is true and correct to the best of my knowledge.

/S/ BRAD KAISERMAN
BRAD KAISERMAN