

CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT,
DIVISION ONE

People v. Gallardo

No. D084845 (Cal. Ct. App. Nov. 26, 2025) · No. D084845 · Decided November 26, 2025

SUMMARY

The California Court of Appeal considered whether assault with intent to commit rape under Penal Code section 220, subdivision (a)(1), is a lesser included offense of rape of an unconscious person under section 261, subdivision (a)(4). The court held that section 220 requires an intent to use force, an element not required for rape of an unconscious person, and affirmed the judgment.

CASE DETAILS

COURT	California Court of Appeal, Fourth Appellate District, Division One
WRITING FOR THE COURT	McConnell, P. J.; Dato, J.; Buchanan, J.
JURISDICTION	California Court of Appeal, Fourth Appellate District, Division One
DECIDED	November 26, 2025
DOCKET	D084845
DISPOSITION	affirmed
PROCEDURAL POSTURE	Gallardo appealed from a judgment of conviction after a jury found him guilty of rape of an unconscious person and assault with intent to commit rape.
STANDARD OF REVIEW	The court applied the statutory elements test de novo to determine whether one offense is necessarily included within another.
PRECEDENTIAL VALUE	Published and certified for publication
PARTIES	Ruben Paramo Gallardo v. The People

TOPICS

- criminal procedure
- statutory interpretation
- appellate procedure
- standard of review

PRACTICE AREAS

- California criminal law
- lesser included offenses
- sexual offenses
- criminal appeals

QUESTIONS PRESENTED

1. Whether assault with intent to commit rape under Penal Code section 220, subdivision (a)(1), is a lesser included offense of rape of an unconscious person under Penal Code section 261, subdivision (a)(4), such that Gallardo could not be convicted of both offenses.

HOLDINGS

1. Assault with intent to commit rape is not a lesser included offense of rape of an unconscious person because assault with intent to commit rape requires an intent to use force, while rape of an unconscious person does not.

KEY QUOTATIONS

“Because the element of intent to use force, which is required for assault with intent to commit rape, is not an element of rape of an unconscious person, section 220 is not a lesser included offense of section 261, subdivision (a)(4), and the jury properly convicted Gallardo of both offenses.” (8)

FACTUAL BACKGROUND

A.S. became highly intoxicated and was in and out of consciousness while drinking and using marijuana at a gathering in D.L.'s apartment. After A.S. passed out on a couch, Gallardo lay beside her and later penetrated her while D.L. observed him on top of A.S. with A.S.'s eyes closed and arms extended. A.S. testified that she did not remember the assault, and medical evidence showed injuries, pain, and Gallardo's DNA on her body.

PROCEDURAL HISTORY

A San Diego County Superior Court jury convicted Gallardo of rape of an unconscious person under Penal Code section 261, subdivision (a)(4), and assault with intent to commit rape under section 220, subdivision (a)(1). The trial court imposed a four-year middle term for count 2 and stayed a concurrent three-year term for count 1 under section 654. Gallardo appealed, arguing that assault with intent to commit rape was a lesser included offense of rape of an unconscious person. The Court of Appeal rejected the argument and affirmed.

DISPOSITION

affirmed

CASES CITED

- People v. Reed (2006) 38 Cal.4th 1224
- People v. Delgado (2017) 2 Cal.5th 544
- People v. Leal (2009) 180 Cal.App.4th 782
- People v. Maury (2003) 30 Cal.4th 342