Filed 7/1/02

NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

---

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>CLARENCE JOSEPH HAYES,<br><br>Defendant and Appellant. | C032730<br><br>(Super. Ct. No. 98F00835) |

Throughout his trial for various sex crimes, Clarence Hayes believed he was defending against charges that would amount to his second strike for purposes of sentencing under the "three strikes" law. (Pen. Code, §§ 667, 1170.12.[1]) The jury convicted him of first degree burglary (§ 459), oral copulation (§ 288a, subd. (c)), robbery (§ 211), forcible digital penetration (§ 289, subd. (a)), two counts of rape (§ 261, subd. (a)(2)), and various enhancements (§ 667.61, subds. (d)(4), (e)(6)). The trial court thereafter allowed the prosecution to add to

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

the information an allegation that defendant had been convicted of robbery in Nevada in 1982, a conviction amounting to his third strike. The court sentenced defendant to state prison for an aggregate indeterminate term of 175 years to life, to be served consecutively to a 10 year determinate term.[2] The court also imposed the maximum $10,000 restitution fine. On appeal, defendant urges us to reverse the third strike conviction on any number of grounds. He asserts instructional and evidentiary error as well.

The Attorney General concedes the prosecution did not introduce sufficient evidence to support the court's finding that defendant had suffered a third strike. We accept the concession. The case is remanded for retrial to determine whether there is sufficient evidence that the out-of-state conviction qualifies as a strike under California law. Both the United States and California Supreme Courts have recently held there is no double jeopardy bar to a second prosecution (*Monge v. California* (1998) 524 U.S. 721 [141 L.Ed.2d 615] (*Monge II*); *People v. Monge* (1997) 16 Cal.4th 826 (*Monge I*)), and on this record, principles of equitable estoppel do not apply. In recalculating the sentence following the retrial, the Attorney General also concedes the trial court must stay imposition of sentence on the burglary count pursuant to section 654. In all other respects, the judgment is affirmed.

---

[2] We need not examine how the sentence was calculated, or whether it is correct, because the case must be remanded and defendant will be resentenced.

**FACTS**

The victim lived with her boyfriend and their two toddlers in a Sacramento apartment. During a quarrel on the afternoon of January 23, 1998, the victim threw a Sunny Delight juice drink bottle at her boyfriend. He took the children to his mother's house. They left the Sunny Delight bottle lying on its side in the hallway inside the apartment.

The victim, drinking a 40-ounce beer, went outside her apartment to visit with friends. Defendant, known in the neighborhood as "Pops," approached and attempted to hug her. A few days earlier she had rejected similar unwelcome advances from him. He persisted and, according to a neighbor, the victim became visibly uncomfortable and attempted to distance herself from him. The neighbor took a walk with the victim and advised her to lock her doors. She locked the dead bolt on her front door.

Some time later, defendant came to the victim's door, knocking and demanding that she open it. She saw him through a peephole, ignored him, and went into her bedroom. She later heard rocks hitting her bedroom window. The victim went to bed and eventually fell asleep.

The victim was awakened when defendant, shoving her face into the pillow, shouted, "'Shut up, bitch.'" She recognized his voice although she did not see his face. As she struggled and screamed, he ripped off her sweatpants and underwear. Unable to physically resist the rape, the victim asked the defendant to use a condom, which he apparently did. He

attempted to put his penis in her vagina; angry and frustrated because he was unable to get an erection, he socked her in the head.

Defendant grabbed the victim by her hair, forced her to turn over, and covered her face with a pair of sweatpants. He bound her feet with a shirt, tied her hands with a cord, and digitally penetrated her vagina. Trying again and failing to penetrate her with his penis, he forced her to orally copulate him. She gagged. She heard him moan and breathe hard. Defendant took $70, some cigarettes, and a VCR from the victim. She saw the back of his head and his flannel jacket as he left the apartment.

Investigating sheriff's deputies found a shopping cart underneath the victim's balcony. Shoe prints left on the cart were consistent with shoes belonging to defendant. A fire extinguisher box on the side of the building provided a ledge for someone to reach the balcony, and a rain gutter provided a handhold. There was also a broken branch in the tree outside the apartment. The Sunny Delight bottle was standing open and upright in the hallway. A latent fingerprint from the bottle matched defendant's right middle finger.

Defendant gave a false name to the arresting officers. The victim identified him in a photographic lineup and at trial. She had no doubt defendant was her assailant. Semen on the vaginal swab taken from the victim at the hospital after the incident was consistent with defendant's blood type. Defendant

has a DNA pattern consistent with a semen stain found on the fitted sheet removed from the victim's bed.

Defendant did not testify. The defense pointed to inconsistencies in the victim's testimony and the inconclusiveness of the scientific evidence, including the possibility that samples were contaminated. In particular, the defense emphasized the victim never saw her assailant's face during the assault and DNA testing excluded him as the source of semen found in the vaginal swab. The jury convicted defendant on all counts.

We agree with defendant that the sentencing issues are the most important issues raised in this appeal, and for this reason, we discuss sentencing before the evidentiary and instructional issues. The Attorney General contends defendant waived many of the issues asserted on appeal by failing to object in the trial court. We choose to address each of the issues on the merits rather than to confront the inevitable claim that defense counsel was inadequate for failing to assert the various objections.

## DISCUSSION

### I

### Sentencing Issues

#### *A. Remand for Retrial of the Prior Conviction Allegation*

The prosecution introduced documentary evidence that defendant pled guilty to robbery, a violation of "NRS 200.380." (Nev. Rev. Stat., ch. 200.) The Nevada robbery statute, unlike California's, requires only general intent and does not require

the victim to be the owner or possessor of the stolen property. (*Litteral v. State* (1981) 97 Nev. 503, 505-508 [634 P.2d 1226, 1227-1229], overruled on other grounds in *Talancon v. State* (1986) 102 Nev. 294, 301 [721 P.2d 764, 768-769]; *People v. Morris* (1988) 46 Cal.3d 1, 19, disapproved on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 545, fn. 6; *People v. Dillon* (1983) 34 Cal.3d 441, 456-462.) To qualify as a strike, however, a prior foreign conviction must include "all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7." (§§ 667, subd. (d)(2), 1170.12, subd. (b)(2).) Hence, as the Attorney General essentially concedes, documentary evidence confirming the simple fact of conviction of NRS 200.380 is insufficient to establish the Nevada offense as a serious felony or strike. The record herein consists of nothing more.

The fact finder is permitted in determining the truth of an allegation of a prior serious felony conviction "to go beyond the least adjudicated elements of the offense and to consider, if not precluded by the rules of evidence or other statutory limitation, evidence found within the entire record of the foreign conviction." (*People v. Myers* (1993) 5 Cal.4th 1193, 1201.) Here, the evidence presented by the People failed to disclose that the facts of the prior offense actually committed would qualify as a strike. The question is whether the prosecution should be accorded a second opportunity to supply evidence it failed to muster in the first trial.

In *Monge II*, *supra*, 524 U.S. 721, the United States Supreme Court affirmed the California Supreme Court's holding that the double jeopardy clause of the federal Constitution does not bar retrial of a sentencing allegation. (*Id.* at p. 734.) Nevertheless, defendant asserts the California Supreme Court left open other grounds upon which a challenge to a second prosecution might be waged. "[W]e express no opinion about whether section 1025 (or some other applicable provision) might in some cases bar retrial of the prior conviction allegation as a statutory matter irrespective of constitutional constraints. Finally, we express no opinion about whether due process protections preclude the prosecution from retrying the prior conviction allegation." (*Monge I*, *supra*, 16 Cal.4th at p. 845.) Cases following *Monge I* and *Monge II* have routinely ordered a second trial of a prior conviction when the evidence is found to be insufficient to sustain a true finding. (*People v. Cortez* (1999) 73 Cal.App.4th 276; *People v. Henley* (1999) 72 Cal.App.4th 555.)

Defendant, in a supplemental letter to this court, relies on the more recent case of *People v. Mitchell* (2000) 81 Cal.App.4th 132 (*Mitchell III*). He argues *Mitchell III* supports his position that a second prosecution of the prior conviction allegation is barred by equitable principles. While *Mitchell III* did indeed prohibit a remand and retrial based on the application of res judicata and law of the case, the case

does not stand for the broad propositions asserted by defendant.[3] Nor is the case factually similar to the matter before us.

Richard Mitchell's case had a very long life in the Court of Appeal, Fourth Appellate District, as recounted by the opinion in *Mitchell III*, *supra*, 81 Cal.App.4th at pages 136-137. Following the initial trial, the court found the defendant had previously suffered a prior serious felony conviction and sentenced him to state prison for nine years. On appeal, appointed counsel raised only the amount of the restitution fine, and the judgment was affirmed. (*People v. Mitchell* (July 26, 1995, D022353) [nonpub. opn.] (*Mitchell I*).) Shortly thereafter, *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 was decided, and Mitchell filed a petition for a writ of habeas corpus seeking resentencing without the strike prior. The writ was granted, but because the trial court refused to strike the prior and added an enhancement the court had missed the first time he was sentenced, Mitchell was resentenced to a prison term of 12 years.

Mitchell obtained new counsel, who filed another appeal and a second petition for a writ of habeas corpus. (*People v. Mitchell* (Jan. 7, 1999, D028246) [nonpub. opn.] (*Mitchell II*).) In *Mitchell II*, the court granted the defendant's petition

---

[3] *Mitchell III* has been criticized and/or rejected in several cases. (*People v. Sotello* (2002) 94 Cal.App.4th 1349, *People v. Franz* (2001) 88 Cal.App.4th 1426, *Cherry v. Superior Court* (2001) 86 Cal.App.4th 1296, *People v. Scott* (2000) 85 Cal.App.4th 905.)

because his first lawyer was ineffective for failing to challenge the sufficiency of the evidence to support the prior conviction. The court, relying on *Monge I*, *supra*, 16 Cal.4th 826 and *Monge II*, *supra*, 524 U.S. 721, remanded the case for a retrial of the prior conviction allegations on condition that the new sentence not exceed nine years.

Mitchell, like defendant here, argued *Monge I* and *Monge II* held only that double jeopardy did not bar a retrial but left open the question whether equitable principles might create such a bar. Mitchell, who had been through two trials, two appeals, and two habeas corpus proceedings, contended he was entitled to "not true" findings on the prior conviction allegations under the law of the case. Thus, according to Mitchell, those findings became res judicata as to the merits in any subsequent litigation of the same controversy. (*Mitchell III*, *supra*, 81 Cal.App.4th at pp. 137-138.) The trial court, although acknowledging *Mitchell II* raised an "'interesting issue,'" rejected the equitable arguments and resentenced him. (*Id.* at p. 138.) The Court of Appeal in *Mitchell III* reversed. (*Id.* at p. 157.)

The court explained: "[F]inality is a cornerstone of both the res judicata and the law of the case doctrines. Because the issue of legally insufficient evidence to support the prior convictions allegations in *Mitchell II* was fully presented and was considered essential to our decision Mitchell's first appellate counsel was ineffective, when the People's petition for review of such decision was denied, it

became a final decision on such merits. Then, when the People on remand did not show there was newly discovered evidence which they, in due diligence, could not have presented at the first trial on the truth of the priors, that decision and its necessary resolution of the legal sufficiency of the evidence for the prior allegations became the law of the case as between these parties. [Citations.] [¶] . . . [¶] Under these circumstances, we believe res judicata principles, independent of their constitutional double jeopardy aspect and as a fundamental principle of justice, also apply and preclude retrial of the prior allegations in this case." (*Mitchell III*, *supra*, 81 Cal.App.4th at pp. 155-156.)

Unlike Mitchell, who garnered three appellate opinions and three trials, this is defendant's first appeal. Hence, the doctrine of law of the case does not apply. Moreover, Mitchell's prosecutor did not introduce any new evidence on remand on the truth of the priors. It was under "these circumstances," the court held, that res judicata applied and precluded retrial of the prior allegations. (*Mitchell III*, *supra*, 81 Cal.App.4th at p. 156.) Here, there has been no previous remand. The prosecutor has not had the opportunity to show newly discovered evidence on the truth of the priors. As a consequence, neither of the equitable principles pivotal to the court's decision in *Mitchell III* are applicable to proof of defendant's prior allegation.

Nor are we persuaded by defendant's more generic equitable estoppel argument. He speaks in terms of a "windfall" to the

prosecution and the waste of judicial resources. But the doctrine of equitable estoppel is a rule of fundamental fairness. Defendant ignores the essence of the doctrine -- that the party seeking an estoppel must have detrimentally relied on the other party's conduct. He has made no effort to demonstrate the requisite detrimental reliance when he presumably was well aware of his own criminal history. Nor does he claim he had insufficient time or resources to mount a credible defense. He has not stated a compelling case to invoke the doctrine of equitable estoppel.

In light of our conclusion that remand is appropriate, we need not address the constitutionality of defendant's sentence. He will be resentenced following his retrial.

### *B. Amendment of the Information After the Jury Was Discharged*

The trial court granted defendant's motion to bifurcate the issue of the truth of his 1988 rape conviction from the trial for the current offenses. The jury convicted defendant on all charges. After defendant waived his right to a jury trial on the previous rape conviction, the jury was discharged. A bench trial followed. The court took the matter under submission and referred the case to the probation department for a presentence investigation and report. The probation report disclosed the 1982 Nevada conviction for robbery.

The prosecutor requested and was granted a continuance to investigate the newly discovered conviction. The prosecutor then moved the court to amend the information. In a lengthy

conversation with the court, defendant expressed bewilderment that he could be punished again for a crime for which he had previously completed a prison term.

The trial court granted the prosecutor's motion to amend the information to allege the Nevada robbery conviction. Defendant did not assert his statutory right to have the same jury decide guilt and the truth of the priors allegations. Defendant personally waived his right to a jury trial as to the truth of the amended allegation. Following a second bench trial, the court found the allegation to be true.

Section 969a states in pertinent part: "Whenever it shall be discovered that a pending indictment or information does not charge all prior felonies of which the defendant has been convicted either in this State or elsewhere, said indictment or information may be forthwith amended to charge such prior conviction or convictions . . . ." The statutory language is quite broad, expressly allowing amendments "[w]henever it shall be discovered" that a defendant has suffered prior felonies. There is nothing in the statutory language allowing amendments only until the jury is discharged.

On appeal, defendant contends the trial court abused its discretion by allowing the amendment after the jury was discharged. In *People v. Tindall* (2000) 24 Cal.4th 767 (*Tindall*), the Supreme Court held that the trial court may not permit the prosecution to amend an information to add alleged prior convictions if the jury has been discharged unless the defendant waives or forfeits the right to have the same jury try

both guilt and priors. (*Id.* at p. 776.) Since the court did allow a postdischarge amendment, the question thus posed is whether the defendant waived or forfeited his statutory right to have the same jury decide both guilt and priors. We conclude that, on the record before us, defendant expressly waived his right to a jury trial both before and after the amendment. Unlike his counterpart in *Tindall*, therefore, he is not entitled to a reversal.

In every expression of the holding in *Tindall*, the majority qualified its ban on postdischarge amendments with a reference to the exception of waiver or forfeiture. (*Tindall*, *supra*, 24 Cal.4th at pp. 776, 782.) The majority relied on the rationale of *People v. Saunders* (1993) 5 Cal.4th 580 (*Saunders*), wherein the court found such a forfeiture of the statutory right to have the same jury. The jury was discharged, without objection by the defendant, before determining the truth of the allegations of prior convictions. Justice George, writing for the majority, explained: "Thus, although sections 1025 and 1164 prohibit a trial court from discharging a jury until it has determined the truth of any alleged prior convictions, a defendant may not complain on appeal of a departure from this procedural requirement unless the error has been brought to the attention of the trial court by means of a timely and specific objection. We do not believe that the Legislature, in enacting sections 1025 and 1164, intended to create a procedural trap that would enable defense counsel to ambush the trial judge and deprive the People of their statutory right to prove one or more

alleged prior convictions for the purpose of enhancing the punishment of the repeat offender." (*Saunders*, *supra*, 5 Cal.4th at pp. 590-591.)

Defendant relies on his dialogue with the trial court wherein he complained about the apparent inequity of serving time twice for the same offense and his inability to dispute a conviction to which he pled guilty in 1982. But his frustration is not the equivalent of a "timely and specific objection" as required in *Saunders*, *supra*, 5 Cal.4th at p. 590. There is absolutely no indication in this record that defendant objected on the grounds of his statutory right to have the same jury decide the truth of the allegations of prior convictions. Rather, he waived a jury at each opportunity and insisted on a court trial both before and after the amendment. He therefore forfeited his right to complain on appeal.

### *C. The Consecutive Sentence on the Burglary Count is Barred*

According to the prosecution, defendant broke into the victim's home for the purpose of sexually assaulting her. The information alleged the burglary was committed with specific intent to commit one or more of the sexual offenses specified in section 667.61. Pursuant to section 667.61, subdivision (d)(4), the jury found the burglary was committed with the specific intent to commit one or more of the charged sexual offenses. Nevertheless, the court imposed consecutive sentences on the sex counts as well as the burglary count. The Attorney General concedes that, on the facts of this case, the trial court should

not have imposed sentence on the burglary count. On remand, therefore, the trial court is directed to stay imposition of sentence on count one.

***D. Restitution***

At defendant's sentencing hearing, the victim testified she lost her job and incurred unreimbursed medical expenses. She did not, however, have the documentation with her itemizing her medical expenses. The trial court ordered defendant to pay the victim restitution. Affording the victim the opportunity to obtain evidence of her medical expenses, the court referred "this matter to the Office of Revenue Recovery for a determination to be made relative to the expenses. I order that all legitimate expenses be paid by way of restitution from Mr. Hayes to the victim, and the first dollars collected from Mr. Hayes by way of his prison work or other resources be provided to the victim to recompense the victim for any economic losses caused by Mr. Hayes."

Defendant contends the court improperly delegated its statutory authority to order restitution to the Office of Revenue Recovery. We rejected the same argument in *People v. Lunsford* (1998) 67 Cal.App.4th 901 (*Lunsford*). Section 1202.4 allows for flexibility in the very circumstances of this case. It provides: "If the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court." (§ 1202.4, subd. (f).)

In *Lunsford*, the sentencing judge indicated he did not know whether or not there were actual restitution costs "'such as for the final medical bills, or burial expenses, but if there are such costs, I do assess those and order restitution to be paid by the defendant in an amount to be determined by the Office of Revenue [Recovery] . . . .'" (*Lunsford*, *supra*, 67 Cal.App.4th at p. 903.) We held the restitution order complied with section 1202.4, subdivision (f) in that it "'direct[ed]'" the Office of Revenue Recovery to "'determine'" the amount of victim restitution "because the proper amount could not be ascertained at the time of sentencing." (*Lunsford*, *supra*, 67 Cal.App.4th at p. 903.)

*Lunsford*, and not the earlier cases cited by defendant, is controlling. The restitution order directing the Office of Revenue Recovery to determine the amount of the victim's restitution was properly entered. As we advised in *Lunsford*, "If defendant is dissatisfied with the agency's determination, he may obtain judicial review in accordance with Penal Code section 1202.4, subdivision (f)(1) . . . ." (*Lunsford*, *supra*, 67 Cal.App.4th at p. 904.)

Defendant also complains the $10,000 restitution fine imposed pursuant to section 1202.4 violates the excessive fines clause of the federal Constitution because it is grossly disproportionate to the gravity of defendant's offense and deprives him of any spending money in prison. His argument is utterly without merit.

The trial court best characterized the nature of his conduct. Defendant, according to the court, committed "a horrible crime involving great violence" and "putting [the] victim in absolute fear for her life. . . ." Moreover, defendant displayed a "high degree of cruelty, viciousness and callousness." He was convicted of forcible oral copulation, digital penetration of the victim's genitalia, burglary, robbery, and two counts of rape. Hence, the seriousness of the crimes, as the Attorney General argues, cannot be overstated. The victim suffered the brutal assault as she lay sleeping in her own home. A mere $10,000 can hardly be said to be grossly disproportionate to the brutal sexual assault on such a vulnerable victim.

Defendant laments the length of time it will take him to earn $10,000 in prison. He insists it is cruel and unusual punishment to deprive him of toiletries and books in prison. Hence, the real thrust of his argument is that he does not have the ability to pay a $10,000 fine.

Defendant bore the burden of proving to the trial court his inability to pay. (*People v. Frye* (1994) 21 Cal.App.4th 1483, 1487.) This he did not do. The court was entitled to consider his future ability to earn income, including prison wages. (*People v. Staley* (1992) 10 Cal.App.4th 782, 785.) His indigency alone is not sufficient to preclude an order to pay a restitution fine. Moreover, the fine is less than the formula provided in section 1202.4, subdivision (b)(2): "In setting a felony restitution fine, the court may determine the amount of

the fine as the product of two hundred dollars ($200) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted." Hence, defendant benefited from the $10,000 statutory cap. (§ 1202.4, subd. (b)(1).)

Defendant cites no authority to support his asserted entitlement to personal items. Certainly, these items would make life in prison more tolerable. But their absence is not, as defendant contends, Dickensian. His desire for some of the simple pleasures of life does not trump his obligation to pay restitution for the horrible crimes he committed. There is, quite simply, nothing unconstitutional about imposition of the fine.

**II**

**Evidence Code Section 1108 Issues**

Defendant objects to the admission of evidence of his prior rape. We need not reiterate his due process and equal protection challenges to Evidence Code section 1108 as they have been soundly rejected. (*People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*); *People v. Fitch* (1997) 55 Cal.App.4th 172.)[4]

[4] Defendant contends his case is distinguishable from *Falsetta* because the jury was not instructed that he was convicted and punished for his prior rape offense. As a consequence, according to defendant, the admission of the evidence pursuant to Evidence Code section 1108 impermissibly diluted the prosecution's burden of proof. We consider defendant's claim of instructional error at pages 19-22 and 25-26, *post*. The instructional error, if any, however, is a separate question from a constitutional attack on Evidence Code section 1108. Because the court carefully weighed the probative value of

Defendant contends the trial court failed to instruct the jury sua sponte not to convict him solely on the testimony of the victim of the prior rape and abused its discretion by admitting the propensity evidence. We find neither instructional nor evidentiary error.

The victim of the 1988 rape testified she met defendant at her sister's home. He volunteered to help her sell a camera. He drove her to a purported buyer's house, but when she knocked on the glass back door of the dark house and no one answered, defendant grabbed her by the throat and threatened her with a knife. He promised to stab her in the heart if she screamed. He forced her to remove her clothing and orally copulate him. He dragged her into the back yard, had intercourse with her, threw her on a picnic table, and had intercourse with her again. Throughout the ordeal, defendant kept slapping her and threatening to kill her if she screamed. After he finally ejaculated, defendant yelled, "'You, bitch. You broke my rubber.'"

Defendant acknowledges a trial court generally does not have an obligation to instruct on the limited purposes for which evidence of prior crimes is admissible. (*Falsetta*, *supra*, 21 Cal.4th at p. 924.) "In the absence of a request, a trial court generally has no sua sponte duty to give a limiting

---

the prior crime against the potential for undue prejudice as compelled by *Falsetta*, we conclude *Falsetta's* disposition of the due process challenge is dispositive of defendant's constitutional challenge.

instruction. Under [Evidence Code] section 355, '[w]hen evidence is admissible . . . for one purpose and is inadmissible . . . for another purpose, the court *upon request* shall restrict the evidence to its proper scope and instruct the jury accordingly.' (Italics added.) Under this provision, a court has no duty to give a sua sponte instruction limiting the purpose for which evidence may be considered. [Citations.] This principle has been held specifically to apply to limiting instructions regarding the admission of a defendant's previous uncharged misconduct. [Citation.] We conclude it applies as well to a limiting instruction on the use of evidence admitted under [Evidence Code] section 1109 [the propensity for domestic violence version of [Evidence Code] section 1108]." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1316.) Defendant insists this is the type of extraordinary, albeit unusual, case that requires a sua sponte instruction. We disagree.

Defendant grossly overstates the significance of the evidence of the prior rape in this trial. The victim described how defendant, an acquaintance she met through her sister, forced her to orally copulate him and then proceeded to rape her. It was, therefore, highly relevant to proving his propensity to rape again, a purpose the Legislature has determined is legitimate. But the prior rape did not dominate the trial; it was hardly more than a footnote. The testimony was short, taking a mere nine pages of reporter's transcript. It merely corroborated the otherwise overwhelming evidence of defendant's guilt, including the victim's positive

identification of her attacker and the blood, DNA, fingerprint, and shoe print evidence.

Defendant, like his counterpart in *Jennings*, *supra*, 81 Cal.App.4th at page 1317, contends *Falsetta*, *supra*, 21 Cal.4th 903 specifically requires the giving of a limited instruction. We echo the First Appellate District: "Appellant is wrong. [Fn. omitted.] The actual holding of the Supreme Court in *Falsetta* was that the trial court in that case 'properly declined' to give a special limiting instruction requested by the defendant, and that '[i]n future cases, defendants *may request* an instruction . . . .' (*Falsetta*, *supra*, 21 Cal.4th at p. 922, italics added.) . . . [¶] . . . [¶] In our opinion, *Falsetta* does not require a trial court to give revised [limiting instructions] under the circumstances presented in this case, in which no party *requested* that the instruction be given in the first place. As the *Falsetta* court noted, a trial court generally has no sua sponte duty to instruct the jury as to the admissibility or use of other crimes evidence. [Citations.] The Supreme Court's opinion stands only for the well-established rule that a court is obliged to give a limiting instruction upon a proper request that it do so; and where a request for a faulty limiting instruction is made, the trial court should tailor the proposed instruction to the standard instructions. Because no request of any kind was made here, there was no error." (*Jennings*, *supra*, 81 Cal.App.4th at pp. 1317-1318.)

In this context, defense counsel's decision not to request an instruction explaining the propensity evidence may have been strategically designed to minimize the impact of the testimony. A sua sponte instruction, however, would have highlighted what the defense sought to neutralize. Defense counsel did not cross-examine the victim and downplayed her significance in closing argument. Hence, he was able to emphasize the prosecution's burden of proving commission of the present offense and to criticize the prosecutor's reliance on past conduct to prove defendant was this victim's assailant.

We therefore reject defendant's contentions that the trial court erred by failing to instruct the jury sua sponte on the limited purpose for which propensity evidence is admissible and that defense counsel was incompetent for failing to request such an instruction. (*Jennings*, *supra*, 81 Cal.App.4th at pp. 1316-1319.) There is nothing so extraordinary about the propensity evidence admitted in this case to overcome the general rule that the court has no obligation to give such an instruction sua sponte. Indeed, there was arguably a strategic reason for not requesting an instruction that would call attention to the evidence the defense sought to minimize. (*People v. Johnson* (1993) 6 Cal.4th 1, 51.) More significantly, there is no reasonable possibility such an instruction would have made any difference in a case in which the victim positively identified her assailant and a vast quantity of physical evidence corroborated her identification. Because there was no prejudice, an inadequacy of counsel claim cannot prevail.

(*People v. Frye* (1998) 18 Cal.4th 894, 979-980; *Jennings*, *supra*, 81 Cal.App.4th at p. 1318.)

Defendant also asserts the trial court abused its discretion by admitting evidence of the prior rape pursuant to Evidence Code section 1108, which provides in pertinent part: "(a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by [Evidence Code] Section 1101, if the evidence is not inadmissible pursuant to [Evidence Code] Section 352." Defendant insists the crimes were dissimilar, the prior rape was remote, and the risk of undue prejudice was a certainty.

The scope of appellate review of a decision to admit evidence under Evidence Code section 352 is exceedingly narrow. The trial court's decision cannot be disturbed on appeal absent a showing that the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) The record before us discloses no such abuse.

We disagree with defendant's assertion that the two rapes bear no similarities. Defendant emphasizes the first rape involved an armed assault, whereas the second did not. He also points out the victim in the prior rape accompanied the defendant for some time in a car, whereas the assailant in the second rape broke into the victim's apartment while she slept.

Few rapists, we venture to say, duplicate their crimes with exactitude. Here, defendant in both cases raped young women he knew. Prior to the first rape, he met his victim at her sister's home, and prior to his rape in this case, he socialized with the victim at her apartment complex. In both cases, he forced his victims to have oral sex before raping them. In both cases, he used threatening language and physical violence. In both cases, there was evidence defendant may have used a condom.

The similarity between the crimes increases the probative value. The probative value was further supported by the independent sources of the information linking defendant to each crime. There is no evidence the victims knew one another or had any connection whatsoever. In fact, the rapes were committed over 10 years apart.

Defendant asserts the first rape was too remote to have any probative value. We disagree. Defendant was incarcerated for eight of those 10 years. Staleness of an offense is generally relevant only if a defendant has led a blameless life in the interim. (*People v. Harris* (1998) 60 Cal.App.4th 727, 739.)

Nor is there significant evidence of undue prejudice. There was little chance of confusing the jury because the victim of the first rape was not allowed to testify until the victim in this case had completed her testimony. Moreover, the earlier victim's testimony was short and succinct. It did not consume an undue amount of time nor was it more inflammatory than the present offense. While defendant did threaten his first victim with a knife, his second victim was equally vulnerable since he

broke into her apartment while she was asleep. Moreover, she was then attacked in her bed, beaten, penetrated, and was tied and bound. In other words, the details of the first rape were no more inflammatory than the second.

Defendant argues the evidence of the prior rape was acutely prejudicial because the jury was not informed he was convicted and punished for the offense. According to defendant, therefore, the jury was likely to convict him of the current charge, repulsed that his prior rape went unpunished. First, we do not believe the jury was likely to draw the inference that defendant escaped punishment simply from the absence of a reference to his conviction. They would be just as likely to assume that, in fact, he was tried and convicted. Second, it was the defense that requested the court to bifurcate the prior rape conviction from the trial despite the court's admonition that the prosecution could submit the evidence of the prior misconduct. Hence, to the extent the jury was misled about the first rape, it was at defendant's behest.

The court properly considered both the probative value of the 1988 rape and the risk of prejudice. Defendant's constitutional right to due process was thereby protected. On this record, we can find no abuse of discretion.

Defendant complains the trial court failed to instruct the jurors they could not consider the evidence of the prior rape unless they found it was proved by a preponderance of the evidence. (CALJIC Nos. 2.50, 2.50.1, 2.50.2.) Nor did the

court restrict the use of the evidence. Defendant did not request either instruction.

Defendant's argument, unlike its more common cousin challenging the propensity instruction as a dilution of the prosecutor's burden of proof, does not impinge on the reasonable doubt standard. At worst, it left the jury without guidance as to the burden of proof necessary to prove the prior rape and how to utilize the evidence.

The jury was properly instructed on the presumption of innocence and the prosecution's burden to prove each offense beyond a reasonable doubt. Since there was no instruction given on the propensity evidence, there was no danger the jury convicted him of the current offense based on a mere preponderance of evidence that he committed the uncharged prior misconduct. (See, e.g., *People v. Jeffries* (2000) 83 Cal.App.4th 15; *People v. Escobar* (2000) 82 Cal.App.4th 1085 (*Escobar*); *People v. James* (2000) 81 Cal.App.4th 1343.) We conclude that, in light of the instructions as a whole, there is no reasonable likelihood the jurors deviated from assessing defendant's guilt according to the reasonable doubt standard.

Moreover, even if the trial court erred by failing to instruct sua sponte, the error is harmless beyond a reasonable doubt. (*Escobar*, *supra*, 82 Cal.App.4th at p. 1101.) The evidence of guilt, defendant's assertions notwithstanding, was overwhelming, including as it did a positive identification and convincing physical evidence. Moreover, the evidence of the prior rape paled in substance and volume to the evidence that

defendant did indeed commit the charged offenses. The instructional error, if any, was not prejudicial under any standard.

**III**

**Instructional Issues**

***A. Unanimity Instruction***

Defendant asserts the trial court erred by failing to instruct the jurors sua sponte that they must agree unanimously on the facts underlying a true finding on each of the burglary enhancements. (§ 667.61, subd. (d)(4).) As a corollary, defendant contends the trial court erred by failing to require the jury to make special findings on the burglary enhancements, and his trial counsel was ineffective for failing to request such findings. The premise to these arguments is flawed.

Defendant was charged in count one with burglary. As enhancements, he was charged with committing forcible rape, digital penetration, and oral copulation during the commission of the burglary. (§ 667.61, subd. (d)(4).) The Attorney General points out that once the jury found defendant guilty of each sexual offense, it was required to determine whether or not defendant committed each offense during the commission of a burglary.

In prosecutions for burglary, the jurors need not agree on the prosecution's theory. (*People v. Failla* (1966) 64 Cal.2d 560, 569.) In other words, the jurors must agree the defendant entered the dwelling with a felonious intent, but they need not

agree on which particular felony he intended. (*People v. Perryman* (1987) 188 Cal.App.3d 1546, 1549.)

Defendant suggests there is a fundamental difference between a conviction for the substantive offense of burglary and a conviction for a burglary enhancement. More specifically, he appears to argue that the prosecution must prove, and the jury must unanimously agree, that defendant entered the dwelling with the specific intent to commit each of the sexual crimes in order for the enhancement to apply to that sex crime. For example, the jury could only sustain the burglary enhancement to the oral copulation count if defendant entered the apartment with the intent to force the victim to perform oral copulation. This premise is wrong.

Section 667.61, subdivision (d)(4) provides: "The defendant committed the present offense during the commission of a burglary, as defined in subdivision (a) of Section 460, with intent to commit an offense specified in subdivision (c)." The statute does not provide, as defendant suggests, that he entertain the intent to commit the specific sex crime at the time of entry, but only that he intend to commit one of the offenses specified in subdivision (c) of section 667.61.

As to the burglary, the jury was instructed: "In order to prove [burglary], each of the following elements must be proved: [¶] One, a person entered an inhabited dwelling house; and, two, at the time of the entry, that person had the specific intent to steal and take away someone else's property and intended to deprive the owner permanently of that property, or,

three, at the time of the entry, that person had the specific intent to commit the crime of rape or forcible oral copulation and/or penetration by a finger. [¶] . . . [¶] If you are satisfied beyond a reasonable doubt and agree unanimously that the defendant made an entry with the specific intent to steal or to commit rape or forcible oral copulation or penetration with a finger, each felonies, you should find the defendant guilty. You are not required to agree as to which particular crime the defendant intended to commit when he entered."

The court also instructed the jury on the burglary enhancements as follows: "It is alleged in Counts two through five that the defendant committed a burglary with the specific intent to commit a forcible rape, in violation of Penal Code Section 261(a)(2), or penetration by a finger in violation of Penal Code Section 289(a), or forcible oral copulation in violation of Penal Code Section 288a(c). [¶] If you find the defendant guilty of one or more of the crimes charged in Counts Two through Five, you must further make a special finding whether the defendant during the commission of a burglary had the specific intent to commit the crime or crimes of forcible rape, Penal Code Section 261(a)(2); penetration by a finger, Penal Code Section 289(a); or forcible oral copulation, Penal Code Section 288a(c)."

These instructions properly state the law. To sustain the burglary enhancements, defendant had to enter the apartment with the specific intent to commit any one of the sex crimes. The jury was not required to agree as to which one as long as each

juror agreed defendant intended to *either* rape the victim, digitally penetrate her, *or* force her to orally copulate him. The jury convicted defendant of burglary and each of the alleged sex crimes. Having been properly instructed that he must have intended to commit at least one of the sex crimes at the time of entry, they did not have to agree that he intended each of the sex crimes at the time he entered the apartment.

The court, of course, had no sua sponte obligation to instruct to the contrary. Nor would special findings be necessary. His lawyer's representation did not fall below an objective standard of reasonableness under prevailing professional norms because unanimity, as argued by defendant, was not compelled. There was no error regarding the instructions or the findings on the burglary enhancements.

### *B. Instruction That Use of a Condom Does Not Constitute Consent*

Defendant argues it was improperly argumentative to instruct the jury that evidence the victim suggested, requested, or otherwise communicated to the perpetrator that a condom be used does not by itself constitute consent (CALJIC No. 1.23.1). The court erred, contends defendant, by giving such a pinpoint instruction on consent.

We conclude this instruction was not argumentative. Rather, it properly explained to the jury that consent cannot be found solely on evidence that a victim asked her attacker to use a condom. In this context, the instruction simply defined consent. (*People v. Gonzalez* (1995) 33 Cal.App.4th 1440, 1443.)

It does not, as defendant urges, invite the jury to draw an inference favorable to the prosecution, nor does it tell the jury to base a finding of consent on this evidence. The instruction is neutral in tone and content. There was no error.

***C. Burglary Instruction***

The jury was instructed as follows in the language of CALJIC No. 14.59: "If you are satisfied beyond a reasonable doubt and agree unanimously that the defendant made an entry with the specific intent to steal or to commit rape or forcible oral copulation or penetration with a finger, each felonies, you should find the defendant guilty. You are not required to agree as to which particular crime the defendant intended to commit when he entered." Defendant contends this instruction created an improper mandatory presumption requiring the jury to find guilt from the specified facts. Once again, defendant errs.

There is nothing in the challenged language inviting the jury to draw inferences from specific items of evidence in order to infer the existence of other facts. Instead, the "specified facts" were the elements of the crime of burglary. Hence, the instruction merely told the jurors that once they found the elements of burglary to be true beyond a reasonable doubt, they should find defendant guilty of burglary. The court did not direct the jury to find one of those elements once they found a certain predicate fact. Nor did the instruction limit the jury's freedom to independently assess the evidence or remove an element from their determination. In short, the instruction did not contain an impermissible mandatory presumption.

### *D. Reading the Information*

Defendant also complains the trial court committed prejudicial error by reading the information to the jury at the outset of the trial, including language characterizing burglary, rape, digital penetration, oral copulation, and robbery as serious felonies. He insists the jury might have punished him for being the type of person who commits serious felonies rather than on the basis of the evidence pertaining to the charged offense. Defendant could not possibly have been prejudiced by the reading of the information. (*People v. Wader* (1993) 5 Cal.4th 610, 646.)

First, the court expressly informed the jury the information was not evidence of defendant's guilt. We, of course, must assume the jury followed the court's instruction. Second, the information simply recites the obvious fact that the alleged sex crimes, burglary, and robbery are serious felonies. The severity of the crimes does not suggest to the jury that they convict defendant for being the type of person who commits serious felonies. The instructions, when taken as a whole, properly informed the jury to consider the evidence of each of the elements of the crimes. There is no possibility on this record that the jury convicted defendant on some attenuated connection between "serious felonies" and the type of person he was rather than on the strength of the evidence of each of the elements of the offenses. There was no prejudicial error.

**DISPOSITION**

The finding that defendant's 1982 Nevada robbery conviction constitutes a strike is reversed. The sentence is vacated, and the matter is remanded to the trial court for retrial of the prior serious felony enhancement and strike allegation pertaining to the robbery conviction and for resentencing. On resentencing, the court is directed to stay imposition of sentence on the burglary count. In all other respects, the judgment is affirmed.

RAYE, J.

We concur:

SCOTLAND, P.J.

NICHOLSON, J.