Filed 12/29/06 P. v. Brown CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ARTICE L. BROWN, Defendant and Appellant.	B187599 (Los Angeles County Super. Ct. No. NA057904)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joan Comparet-Cassani, Judge. Affirmed as modified.

Richard A. Levy, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jaime L. Fuster and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

Artice L. Brown appeals from the judgment entered after a jury convicted him of one count of rape, with a true finding as to a special allegation qualifying the conviction for sentencing under California's "One Strike" law, and one count of second degree robbery. We modify the judgment to reflect an award of 859 days of actual custody credit and, as modified, affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Charges*

Brown was charged by information with three counts of rape (Pen. Code, § 261, subd. (a)(2))[1] (counts 1, 2 and 3), each with the special allegation under the One Strike law he had kidnapped the victim and the movement of the victim had substantially increased the risk of harm to the victim above that level of risk necessarily inherent in the underlying rape offenses (§ 667.61, subds. (a) & (d)(2)), and one count of robbery (§ 211) (count 4).[2] The information also specially alleged Brown had served one prior prison term within the meaning of section 667.5, subdivision (b).

2. *Summary of the Evidence Presented at Trial*

Jessica S., then 16 years old, spent the day of July 25, 2003 selling candy outside several stores, earning between $150 and $200. Jessica was hearing impaired but had some ability to read lips.

On her way home in the early evening she got off a bus in a residential area of Long Beach to transfer to another bus. While waiting for the second bus, she decided to visit a friend, who frequented a residential garage that could be entered from a nearby alley. As Jessica walked to the alley, she was approached by Brown, who asked her if she wanted to "kick it" with him. Feeling uncomfortable with Brown and sensing something was wrong, Jessica told him she had to leave. She continued to walk toward

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[1] Statutory references are to the Penal Code unless otherwise indicated.

[2] A fifth count for assault with a deadly weapon or by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)) was dismissed by the People prior to trial.

her friend's garage, but Brown followed her and asked crudely whether she wanted to have sex with him. When Jessica declined, Brown grabbed her and forced her to kiss him; she smelled alcohol on his breath. Jessica broke free, screaming for help, and ran down the alley and into her friend's garage.

Although Jessica's friend was not in the garage, two other men were there. Jessica tried to explain to the men, who spoke mostly Spanish, that she was being followed and needed help. Jessica hid behind a couch, while one of the men held the garage door closed and the other picked up a crowbar. Brown forced his way through the door into the garage, telling the men Jessica was his "lady" and he would beat them up if they got involved. Brown found Jessica behind the couch and asked her to come with him. When she refused, he slapped her face seven or eight times, as she struggled to break free. Brown threatened to hit Jessica with his closed fist if she did not follow him.

Jessica ran two or three feet outside the garage, begging the two men to help her, but Brown caught up to her and grabbed her. As she continued to scream for help, Brown pulled Jessica -- while slapping her, threatening her with his fist and telling her to be quiet -- into an alcove in the alley, 72 1/2 feet from her friend's garage. Brown threw Jessica against the gate at the back of the alcove, scratching her back. He then pushed her to the ground, took off all of her clothes and forced her to have sex with him. When Brown was done, he grabbed Jessica's purse from her and ran away.

Brown was apprehended less than 100 yards from the scene, with $103 in cash and a tube of mascara in the pocket of his pants. Jessica identified Brown in a field show-up as her assailant. Her purse was found in a trashcan in the alley. Although the police officer who had detained Brown did not observe any signs of intoxication, tests administered approximately two hours after the incident revealed Brown had a blood alcohol content of 0.12 or 0.13.

Jessica was taken to the hospital where she was given a sexual assault examination by a forensic nurse. Jessica had numerous scrapes and scratches on her face, chest, arms, hands, back, legs and feet. Her nose was red and swollen; and she had bruises under her right eye and on the left side of her forehead and bumps on her head. An abrasion also

was found at the entrance to Jessica's vagina; and there was redness to her cervix. The same nurse examined Brown, who had an abrasion on his left arm and an ulcer on his penis. A swab of Jessica's vagina revealed the presence of sperm, which matched Brown's DNA profile.

In his defense Brown presented the testimony of Dr. Arthur Kowell, a neurologist and clinical professor at the UCLA School of Medicine, who had examined Brown in jail in March 2005, referred him for a variety of diagnostic procedures and reviewed various medical records and the police report in this case. According to Dr. Kowell, Brown suffered from an organic brain dysfunction in the frontal lobe area; and two psychologists had developed similar diagnoses for Brown. Dr. Kowell testified that dysfunction could affect a person's impulse control and Brown's history demonstrated impulse control problems and attention deficit hyperactivity disorder since childhood. Dr. Kowell also testified a polysubstance abuse problem would aggravate impulse control issues. Because Brown still had a blood alcohol content of 0.12 to 0.13 percent approximately two hours after the incident, the level would have been higher at the time of the attack on Jessica and would have intensified Brown's impulse control problem. Based on Dr. Kowell's testimony, defense counsel argued to the jury Brown did not have the specific intent necessary for a conviction on the robbery offense charged in count 4 or for true findings on the One Strike allegations with respect to the underlying rape offenses charged in counts 1, 2 and 3.

The parties stipulated Brown had been convicted on February 14, 2001 of unlawful driving or taking a vehicle in violation of Vehicle Code section 10851 and proof of that crime, which occurred on January 4, 2001, required the specific intent to permanently or temporarily deprive the owner of his or her vehicle.

3. *The Jury's Verdict and Sentencing*

The jury found Brown guilty of one count of rape (count 1) and one count of second degree robbery (count 4). As to count 1, the jury found true the special allegation under section 667.61, subdivision (d)(2), Brown kidnapped the victim and the movement

substantially increased the risk of harm to the victim. It found Brown not guilty of the rape offenses charged in counts 2 and 3.

The trial court sentenced Brown to an aggregate state prison term of 30 years to life, consisting of the upper term of five years for the robbery charged in count 4, plus a consecutive term of 25 years to life for the rape charged in count 1.[3]

CONTENTIONS

Brown contends (1) the evidence is insufficient to support the jury's true finding on the special allegation under section 667.61, subdivision (d)(2); (2) the prosecutor engaged in prejudicial misconduct by referring in her closing argument to Brown's demeanor at trial; (3) the trial court committed reversible error by asking defense counsel twice not to ask leading questions of Brown's expert witness on direct examination; and (4) the trial court prejudicially erred by admitting evidence of his prior conviction for unlawfully taking or driving a vehicle. With respect to his sentence, Brown contends (1) the trial court's imposition of the upper term on count 4 and consecutive sentences on counts 1 and 4 violated his right to a jury trial under *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*); (2) he is entitled to one additional day of actual custody credit; and (3) the $20 court-security fee should be stricken.

DISCUSSION

1. *The Evidence Is Sufficient To Support the Jury's True Finding on the Special Allegation Under Section 667.61, Subdivision (d)(2)*

a. *Standard of review*

In reviewing a challenge to the sufficiency of the evidence, we "consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt. [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 432; *People v. Staten* (2000) 24 Cal.4th 434, 460; *People v. Hayes* (1990) 52 Cal.3d

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[3] The prison-prior allegation under section 667.5, subdivision (b), which was not pursued by the People, was stricken by the trial court.

577, 631.) Our sole function is to determine if any rational trier of fact could have found the essential elements of the crime or the special allegation present beyond a reasonable doubt. (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The Supreme Court has held, "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the jury's finding].'" (*Bolin*, at p. 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

"Substantial evidence" in this context means "evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *People v. Hill* (1998) 17 Cal.4th 800, 848-849 ["'"When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence -- i.e., evidence that is credible and of solid value -- from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt."' [Citations.]"].) "Although the jury is required to acquit a criminal defendant if it finds the evidence susceptible of two reasonable interpretations, one of which favors guilt and the other innocence, it is the jury, not the appellate court, which must be convinced of his guilt beyond a reasonable doubt." (*People v. Millwee* (1998) 18 Cal.4th 96, 132.)

b. *Substantial evidence demonstrates Brown kidnapped Jessica and, as a result, substantially increased the risk of harm to her*

Pursuant to California's One Strike law, a person convicted of rape in violation of section 261, subdivision (a)(2), under one or more of the circumstances specified in section 667.61, subdivision (d), must be punished by a state prison term of 25 years to life.[4] (§ 667.61, subd. (a).) One of the circumstances specified in section 667.61,

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[4] "The purpose of the One Strike law is 'to ensure serious and dangerous sex offenders would receive lengthy prison sentences upon their first conviction,' 'where the nature or method of the sex offense "place[d] the victim in a position of *elevated vulnerability*." [Citation.]' [Citation.]" (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 186.)

subdivision (d) -- the one found true by the jury in connection with Brown's conviction for the rape of Jessica charged in count 1 -- is that "[t]he defendant kidnapped the victim of the present offense and the movement of the victim substantially increased the risk of harm to the victim over and above that level of risk necessarily inherent in the underlying offense in subdivision (c)." (§ 667.61, subd. (d)(2).)

Whether the defendant's movement of a victim is merely incidental to the underlying rape offense is determined by the scope and nature of the movement, including the actual distance the victim is moved (although no minimum distance is required) and the environment in which the movement occurred. (*People v. Rayford* (1994) 9 Cal.4th 1, 12; see *People v. Dominguez* (2006) 39 Cal.4th 1141, 1151-1152.) "[I]ncidental movements are brief and insubstantial, and frequently consist of movement around the premises where the incident began. [Citations.]" (*People v. Diaz* (2000) 78 Cal.App.4th 243, 247.) Whether the movement caused a substantial increase in the risk of harm to the victim is dependent on "the decreased likelihood of detection, the danger inherent in a victim's foreseeable attempts to escape, and the attacker's enhanced opportunity to commit additional crimes. [Citations.]" (*Rayford*, at p. 13; *Dominguez*, at p. 1152.) The increased risk of harm may be physical or psychological and need not necessarily materialize during the crime. (*People v. Nguyen* (2000) 22 Cal.4th 872, 886; *Rayford*, at p. 14.)

Brown contends the evidence is insufficient to support the jury's true finding on the section 667.61, subdivision (d)(2), special allegation because his movement of Jessica from the garage into the alcove in the alley was merely incidental to the rape and did not substantially increase the risk of harm to her.[5] The evidence, however, establishes

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[5] The jury was instructed under CALJIC No. 9.54, "The defendant is accused in a special allegation of violation of Penal Code section 667.61, subdivision [(d)(2)] of the crime of kidnapping to commit forcible rape as to counts one, two and three. The specific intent to commit forcible rape must be present when the kidnapping commences. Kidnapping is the unlawful movement by physical force of a person, without the person's consent, for a substantial distance where the movement is not merely incidental to the commission of the forcible rape and where the movement substantially increases the risk

Jessica, in trying to escape from Brown, ran two to three feet out of the garage before he grabbed her and pulled her 72 1/2 feet down the alley to a secluded alcove, while slapping and threatening her. Brown then threw Jessica against the gate at the back of the alcove and pushed her to the ground before raping her. After completing the rape Brown fought with Jessica for her purse and ran away, leaving Jessica naked in the alcove.

Based on both the distance Brown moved Jessica and his use of violence to effect that movement, pulling Jessica from the open alley to the alcove was not merely incidental to the underlying rape. (See, e.g., *People v. Shadden* (2001) 93 Cal.App.4th 164, 168-169 [movement not incidental when defendant moved rape victim nine feet from public area of store to store's private back room]; *People v. Salazar* (1995) 33 Cal.App.4th 341, 344, 348 [movement not incidental when defendant moved rape victim out of public view by taking her 29 feet from outside walkway into motel bathroom].) Contrary to Brown's contention, his movement of Jessica is not similar to the defendant's

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of harm to the person moved over and above that necessarily present in the crime of forcible rape itself. In this allegation, namely, kidnapping to commit forcible rape, the risk of harm requirement refers to the risk of either physical or mental harm. Kidnapping is also the unlawful compulsion of another person, without that person's consent, and because of a reasonable apprehension of harm to move for a substantial distance where such movement is not incidental to the forcible rape, and where the movement substantially increases the risk of harm to the person moved over and above that necessarily present in the crime of forcible rape itself. Brief movements to facilitate the crime of forcible rape are incidental to the commission of the forcible rape. On the other hand, movements to facilitate the forcible rape that are for [a] substantial distance rather than brief are not incidental to the commission of the forcible rape. In order to prove this allegation, each of the following elements must be proved: A person was unlawfully moved by the use of physical force; the movement of that person was caused with the specific intent to commit forcible rape, and the person causing the movement had the required specific intent when the movement commenced; three, the movement of the person was without that person's consent; four, the movement of the person was for [a] substantial distance[,] that is a distance more than slight, brief or trivial; and five, the movement substantially increased the risk of harm to the person moved over and above that necessarily present in the crime of forcible rape itself. The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true."

initial movement of the victim in *People v. Diaz, supra*, 78 Cal.App.4th at pages 248-249, from a sidewalk to a grassy strip immediately adjacent to the sidewalk, in full view of a major urban street. The initial movement in *Diaz* did not cause a substantial change in the surroundings and may have been only a short distance from the location where the defendant initially contacted the victim. Here, in contrast, Brown altered Jessica's surroundings by moving her a substantial distance out of the open alley to an alcove where she could not been seen by someone passing by.

As to the increased risk of harm element of the special allegation, pulling Jessica to the alcove, enclosed on three sides and out of sight of anyone walking by the alley, decreased the risk Brown would be detected and made it more dangerous for Jessica to attempt to escape and less likely she could succeed in doing so. In addition, by moving her to the alcove, Brown inflicted greater injury on Jessica, both during and after the move, ultimately forcing her to submit to him in fear he was going to break her neck. There was thus ample evidence Brown's movement of Jessica substantially increased the risk of harm to her above that level of risk necessarily inherent in the underlying rape offense in count 1. (*People v. Shadden, supra*, 93 Cal.App.4th at p. 170 [risk of harm to victim substantially increased when defendant moves her out of public view, making it "less likely for others to discover the crime" and decreasing the "odds of detection"]; *People v. Salazar, supra*, 33 Cal.App.4th at pp. 348-349 [defendant substantially increased risk of harm to victim by confining and isolating her in a motel room bathroom giving him "an enhanced opportunity to perpetrate any additional crimes he desired"].)

2. *The Prosecutor's Comments During Closing Argument on Brown's Courtroom Demeanor Did Not Constitute Reversible Error*

a. *The remarks were not so egregious or reprehensible as to amount to misconduct under either the federal or state standard*

Brown based his defense on the expert testimony of Dr. Kowell, arguing his impulse control problems prevented him from forming the specific intent necessary to convict him of robbery and to find true the special allegation he had kidnapped Jessica

with intent to rape her.[6] During closing argument the prosecutor rebutted that contention, noting the jury had observed Brown during trial and he had maintained control while witnesses testified about what he had done, "Doesn't sound like somebody who can't

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[6] The jury was instructed under CALJIC No. 3.32, "You have received evidence regarding a mental defect of the defendant Artice Brown. You should consider this evidence solely for the purpose of determining whether the defendant actually formed the required specific intent, which is an element of the crime charged in count 4 and the special allegation of kidnapping." The jury was also instructed under CALJIC No. 3.31, "In the crime charged in count four, namely, second degree robbery, and the special allegation of kidnapping, there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. Unless this specific intent exists, the crime and special allegation to which it relates has not been committed. The specific intent required is included in the definitions of the crime of second degree robbery and in the special allegation of kidnapping which are set forth elsewhere in these instructions. The crime of second degree robbery requires the specific intent to permanently deprive that person of property, and the special allegation of kidnapping requires the specific intent to move the person for the purposes of committing a forcible rape." With respect to the robbery charge, the jury was instructed under CALJIC No. 9.40 a conviction for robbery required proof "the property was taken with the specific intent permanently to deprive that person of the property"; and, as explained, CALJIC No. 9.54 informed the jury regarding the special allegation under section 667.61, subdivision (d)(2), "[t]he specific intent to commit forcible rape must be present when the kidnapping commences" and in order for the jury to find the allegation true the People were required to prove "[t]he movement of [the victim] was caused with the specific intent to commit forcible rape, and the person causing the movement had the required specific intent when the movement commenced."

Although not an issue in this case, there is some question whether a special allegation under section 667.61, subdivision (d)(2), requires the kidnapping occur with the specific intent to commit rape. (Compare *People v. Jones* (1997) 58 Cal.App.4th 693, 717 ["Nothing in [§ 667.61, subd. (d)(2),] explicitly requires that the defendant kidnap the victim for the purpose of committing the sexual offense"]; Judicial Council of California Criminal Jury Instructions (2006) CALCRIM No. 3175 [eliminating a specific intent requirement for a § 667.61, subd. (d)(2), allegation] with *People v. Jones* (2001) 25 Cal.4th 98, 102 [describing the jury's true finding on a § 667.61, subd. (d)(2), allegation as a finding "that in order to facilitate the commission of the crimes [the defendant] personally kidnapped the victim and that the movement substantially increased the risk of harm"].)

control their anger; that's impulsive; doesn't know what they are doing."[7] On appeal Brown contends the prosecutor's reference to his demeanor during trial notwithstanding his decision not to testify constitutes prejudicial misconduct.

"'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution only when it comprises a pattern of conduct so "egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" [Citation.]" (*People v. Navarette* (2003) 30 Cal.4th 458, 506.)

Generally a prosecutor's comment on a nontestifying defendant's demeanor during a trial on guilt is improper unless he or she merely asked the jury to ignore the defendant's conduct. (*People v. Boyette* (2002) 29 Cal.4th 381, 434 ["'In criminal trials of guilt, prosecutorial references to a nontestifying defendant's demeanor or behavior in the courtroom have been held improper on three grounds: (1) Demeanor evidence is cognizable and relevant only as it bears on the credibility of a witness. (2) The prosecutorial comment infringes on the defendant's right not to testify. (3) Consideration of the defendant's behavior or demeanor while off the stand violates the rule that criminal conduct cannot be inferred from bad character.' [Citation.]"].) Accordingly, Brown is correct the prosecutor should not have commented on his courtroom demeanor to rebut Dr. Kowell's expert testimony. Nevertheless, this brief statement did not rise to the level

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[7] The prosecutor stated in summation, "He [the defense expert] wants you to believe the defendant is a zombie; he has no impulse control and that he doesn't know the consequences of what he's [*sic*]. Remember I asked the doctor, if the defendant had been cured [since] you treated him. The doctor said, no, he hadn't seen him again since. You have been able to watch the defendant throughout this trial. See him partake in the trial. Know where to sit in the trial[,] not act out when there are people on the witness stand talking about him, talking about what he did or even the doctor talking about his past. He sits there quietly. Doesn't sound like somebody who can't control their anger; that's impulsive; doesn't know what they are doing."

of prosecutorial misconduct under either the federal or state standard.[8] Brown does not suggest the remark was anything more than an isolated comment, much less part of a pattern of egregious conduct that infected his trial with such unfairness as to deny him due process. (*People v. Navarette, supra*, 30 Cal.4th at p. 506.) In addition, nothing in the record suggests the prosecutor used the remarks in a deceptive or reprehensible attempt to persuade the jury of Brown's guilt on the robbery charge and the One Strike allegation so as to violate state law. (*Ibid*.)[9]

b. *Brown forfeited any claim the prosecutor's remarks constituted improper comment on his election not to testify*

Although not expressly articulated as a claim of *Griffin* error, Brown's contention the prosecutor committed prejudicial misconduct by referring to his courtroom demeanor implicitly suggests a claim the prosecutor's closing argument was, in effect, an impermissible comment on his election not to testify in violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution. (See *Griffin v. California* (1965) 380 U.S. 609, 615 [85 S.Ct. 1229, 14 L.Ed.2d 106] (*Griffin*) [neither the People nor the trial court may convert defendant's decision not to testify into evidence of a defendant's guilt; to do so impermissibly burdens defendant's invocation of his or her Fifth Amendment rights]; *People v. Medina* (1974) 41 Cal.App.3d 438, 457 [finding *Griffin* error when prosecutor's comments had the effect of "urg[ing] the jury to believe the testimony of the three accomplice witnesses because the defendants, who

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[8] As discussed in connection with Brown's implicit suggestion the prosecutor's remarks constituted improper comment on his election not to testify, Brown's claim of prosecutorial conduct must also be rejected on the ground he forfeited it by failing to object in the trial court. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841 ["As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion -- and on the same ground -- the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety"].)

[9] The issue of prosecutorial misconduct is currently pending before the Supreme Court in *People v. Lopez*, review granted July 19, 2006, S143615, which involves a prosecutor's reference to the "horrendous crimes" committed by Catholic priests during closing argument in the trial of a priest accused of committing a lewd act on a child.

were the only ones who could have refuted it, did not take the stand and subject themselves to cross-examination and to prosecution for perjury"].) To the extent Brown complains of an indirect infringement on his right not to testify, he has forfeited that assertion by failing to object to the prosecutor's remark at trial and to request the jury be admonished to disregard the impropriety. (*People v. Turner* (2004) 34 Cal.4th 406, 421 [defendant's failure to object to alleged *Griffin* error forfeited claim on appeal]; *People v. Medina* (1995) 11 Cal.4th 694, 756; *People v. Mincey*, *supra*, 2 Cal.4th at p. 446.) Contrary to Brown's contention, nothing in the record suggests an objection by his counsel would not have been sustained and followed immediately by an admonition to the jury to disregard the argument or that these remedies would not have cured any prejudice. (*People v. Green* (1980) 27 Cal.3d 1, 34 ["[T]he initial question to be decided in all cases in which a defendant complains of prosecutorial misconduct for the first time on appeal is whether a timely objection would have cured the harm. If it would, the contention must be rejected"].) Accordingly, a timely objection was required.

c. *Brown has not demonstrated prejudice as a result of his counsel's failure to object to the prosecutor's remark*

Recognizing the forfeiture problem, as an alternative to his claim of prosecutorial misconduct, Brown urges us to hold his counsel's failure to object to the prosecutor's comments constituted ineffective assistance of counsel. To prevail on this claim, Brown must establish his counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-687 [104 S.Ct. 2052, 80 L.Ed.2d 674] (*Strickland*); *People v. Williams* (1997) 16 Cal.4th 153, 215.)

"'The burden of sustaining a charge of inadequate or ineffective representation is upon the defendant. The proof . . . must be a demonstrable reality and not a speculative matter.' [Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 656.) There is a presumption the challenged action "'might be considered sound trial strategy'" under the circumstances. (*Strickland*, *supra*, 466 U.S. at pp. 689, 694; accord, *People v. Dennis*

(1998) 17 Cal.4th 468, 541.) On a direct appeal a conviction will be reversed for ineffective assistance of counsel only when the record demonstrates there could have been no rational tactical purpose for counsel's challenged act or omission. (*People v. Lucas* (1995) 12 Cal.4th 415, 442 ["Reviewing courts reverse convictions on direct appeal on the ground of incompetence of counsel only if the record on appeal demonstrates there could be no rational tactical purpose for counsel's omissions"]; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1058 ["'If the record sheds no light on why counsel acted or failed to act in the manner challenged, "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," [citation], the contention [that counsel provided ineffective assistance] must be rejected.'"].) "[R]arely will the failure to object establish incompetence of counsel, because the decision whether to raise an objection is inherently tactical. [Citation.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 678.)

In considering a claim of ineffective assistance of counsel, it is not necessary to determine "'whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies . . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'" (*In re Fields* (1990) 51 Cal.3d 1063, 1079, quoting *Strickland*, *supra*, 466 U.S. at p. 697.) It is not sufficient to show the alleged errors may have had some conceivable effect on the trial's outcome; the defendant must demonstrate a "reasonable probability" that absent the errors the result would have been different. (*People v. Williams*, *supra*, 16 Cal.4th at p. 215; *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218; see *People v. Mesa* (2006) 144 Cal.App.4th 1000, 1008.)

In this case, even if the prosecutor's remarks constituted *Griffin* error and Brown's counsel had no valid tactical reason for failing to object and request an admonition,[10]

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[10] Although we need not decide the issue, Brown's counsel may well have made a tactical choice not to highlight the prosecutor's words and, instead, to focus the jury on Dr. Kowell's testimony. (*People v. Welch* (1999) 20 Cal.4th 701, 754 [trial counsel's

Brown's ineffective assistance of counsel claim must be rejected because he has failed to demonstrate a reasonable probability the outcome of his trial would have been different absent that error. The trial court instructed the jury under CALJIC No. 2.60 that a defendant in a criminal trial has a constitutional right not to testify and it must not draw any inference from the fact a defendant does not testify or permit the matter to enter into its deliberations, as well as CALJIC No. 2.61 that, in deciding whether to testify, the defendant may rely on the state of the evidence and the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the crime charged. Additionally, the jury was instructed statements by the prosecutor are not evidence (CALJIC No. 1.02) and the verdict must be based on evidence actually received at trial and not from any other source (CALJIC No. 1.03). Moreover, Dr. Kowell admitted on cross-examination some of the diagnostic tests given to Brown did not reveal any abnormalities and the test that did reveal an abnormality will indicate abnormalities of some sort in a large majority of the general population, casting in doubt the defense theory Brown's impulse control problems prevented him from forming the requisite specific intents for the robbery charge and the One Strike allegation. Given Dr. Kowell's own concessions, the strength of the evidence against Brown on the specific intent issues, and the brevity of the prosecutor's remarks, which did not involve any direct comment on Brown's failure to testify, we are convinced Brown's counsel's failure to object to the prosecutor's comment on Brown's courtroom demeanor did not adversely affect the outcome of his trial. (*People v. Waidla* (2000) 22 Cal.4th 690, 719.)

3. *The Trial Court Did Not Commit Reversible Error By Requesting Defense Counsel Not To Ask Leading Questions*

Brown contends the trial court committed reversible error by requesting his counsel twice during the direct examination of Dr. Kowell, his expert witness, not to ask

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failure to object to alleged prosecutorial misconduct tactical because "[h]e could reasonably have determined that the risks of raising the objection and offending or annoying the jury outweighed whatever benefit might have been obtained from prosecutorial remarks that were little likely to prejudice his client"].)

leading questions.[11] Brown maintains the trial court's admonishment of his counsel was improper because an expert witness may be asked leading questions on direct examination and the "erroneous chastising" led the jury to believe Dr. Kowell was being coached and cast "grave doubt" on the expert's testimony.

As an initial matter, Brown forfeited his claim any judicial error violated his rights by failing to object and request an admonition to the jury. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237 ["As a general rule, judicial misconduct claims are not preserved for appellate review if no objections were made on that ground at trial"]; *People v. Snow* (2003) 30 Cal.4th 73, 77-78.) Contrary to Brown's contention, the trial court's alleged improper requests to his counsel do not indicate an objection would have been futile or an admonition to the jury would have failed to cure any misconduct. (*People v. Sanders* (1995) 11 Cal.4th 475, 531 ["'[d]efendant's failure to object at trial . . . particularly where (as here) such action would have permitted the court to clarify any possible misunderstanding resulting from the comments, bars his claim of error on appeal.' [Citation.] 'The purpose of the rule requiring timely objection is to give the trial court the opportunity to cure any error, if possible, by an admonition to the jury.' [Citation.]"].) The requests by the trial court here certainly do not suggest the "evident hostility" between the court and defense counsel necessary to render an objection and jury admonition futile. (See *Sturm*, at p. 1237.)

Independent of the issue of forfeiture, Brown's argument lacks any merit. The trial court has both the inherent right and statutory duty to control the proceedings of a trial. (*People v. Burnett* (1993) 12 Cal.App.4th 469, 475; § 1044 ["It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of

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[11] During Dr. Kowell's direct examination, after a series of questions in which the expert essentially responded "correct," the trial court requested, "If you could not use so many leading questions and let him testify more, please, I'd appreciate it because you are on direct." Defense counsel responded, "I apologize." Soon thereafter defense counsel asked another series of questions prompting responses of "yes" or "correct" from Dr. Kowell; and the trial court stated, "If you could ask him what his opinion is instead of asking a leading question, I'd appreciate it." Defense counsel responded, "Okay."

evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved"].) In this regard, "'[a] court may control the mode of questioning of a witness and comment on the evidence and credibility of witnesses as necessary for the proper determination of the case. [Citations.] Within reasonable limits, the court has a duty to see that justice is done and to bring out facts relevant to the jury's determination. [Citation.] A court commits misconduct if it persistently makes discourteous and disparaging remarks so as to discredit the defense or create the impression it is allying itself with the prosecution.' [Citation.]" (*People v. Raviart* (2001) 93 Cal.App.4th 258, 269.) We "'evaluate the propriety of judicial comment on a case-by-case basis, noting whether the peculiar content and circumstances of the court's remarks deprived the accused of his right to trial by jury.'" (*People v. Sanders, supra*, 11 Cal.4th at pp. 531-532.)

Nothing about the trial court's two requests of defense counsel in this case suggests the court was discrediting the defense or creating the impression it had aligned itself with the prosecution. (*People v. Raviart, supra*, 93 Cal.App.4th at p. 269.) Even if defense counsel's leading questions to Dr. Kowell were technically permissible (*People v. Campbell* (1965) 233 Cal.App.3d 38, 44), the trial court had the inherent power to control the mode of questioning to accomplish the "effective ascertainment" of the issues relevant to the jury's determination. (§ 1044.) Indeed, the trial court's requests to defense counsel may well have been intended to help the defense by allowing the jury to hear Dr. Kowell's explanation of Brown's diagnosis and its potential impact on Brown's behavior, rather than counsel's summation of the opinion in question form.[12] It was not the trial court's requests but rather the leading questions being asked by defense counsel that created the risk the jury would conclude Dr. Kowell was being coached. The trial

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[12] As one leading treatise remarks with respect to the use of leading questions in the direct examination of an expert witness, "Asking leading questions (typically followed by a series of monotonous 'yes' replies) is not the best technique to persuade the jury." (Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2006) ¶ 11:44, p. 11-14.4.)

court's limited and courteous requests to defense counsel in no way deprived Brown of his right to a jury trial. (*People v. Sanders*, *supra*, 11 Cal.4th at pp. 531-532.)

In any event, even if the court's requests could be construed as improper, they were harmless even under the most stringent beyond-a-reasonable-doubt standard of prejudice. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) The jury's rejection of the defense theory that Brown's impulse control problems prevented him from forming the specific intent required for the robbery charge and the One Strike allegation was consistent with the evidence: Brown forced Jessica to kiss him and asked her crudely to have sex with him during their initial street encounter before he struggled with her in the garage and pulled her across the alley to the alcove where he raped and robbed her. That evidence amply demonstrates Brown had the specific intent both to rape Jessica when he started to kidnap her and to permanently deprive her of her property when he took her purse. Moreover, as noted, it likely was of benefit to Brown for his counsel not to ask leading questions of his only witness. In addition, any impropriety in the trial court's requests was mitigated by the instruction to the jury under CALJIC No. 17.30, "I have not intended by anything I have said or done, or by any questions that I may have asked, or by any ruling I may have made, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness. If anything I have done or said has seemed to so indicate, you will disregard it and form your own conclusion." It is presumed the jurors followed that instruction. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

4. *The Trial Court Did Not Prejudicially Err By Permitting the Admission of Evidence of Brown's Prior Felony Conviction*

Once Brown's counsel indicated he planned to present testimony from Dr. Kowell that Brown had a brain dysfunction causing impulse control problems and to use that testimony to argue to the jury Brown lacked the specific intent required for a conviction of robbery and for a true finding on the One Strike allegation, the People sought to introduce evidence that Brown had a prior felony conviction, by virtue of a guilty plea, for the unlawful taking or driving of a vehicle, a specific intent crime. (See *People v.*

Garza (2005) 35 Cal.4th 866, 876 ["A person can violate [Vehicle Code] section 10851(a) 'either by taking a vehicle with the intent to steal it or by driving it with the intent only to temporarily deprive its owner of possession (i.e., joyriding)'"].) Overruling Brown's objection to admission of the evidence based on Evidence Code sections 1101, subdivision (b), and 352,[13] the trial court allowed the People to ask Dr. Kowell on cross-examination whether he had considered the fact of the prior conviction in reaching his opinion about Brown. In addition, the parties stipulated Brown had been "convicted . . . of the crime of unlawful driving or taking of a vehicle, in violation of Vehicle Code section 10851A, a felony, on February 14, 2001, and that that crime was committed on January 4th of 2001, and that crime is a specific intent crime, and the intent required is either to permanently or temporarily deprive the owner of their vehicle." On appeal Brown contends admission of evidence regarding his prior felony conviction constitutes an abuse of the trial court's discretion under Evidence Code sections 1101, subdivision (b), and 352.

No abuse of discretion occurred. Contrary to Brown's contention, the evidence was not impermissible character evidence under Evidence Code section 1101, subdivision (b), because it was not admitted for the purpose of proving Brown had a criminal disposition.[14] (See *People v. Felix* (1993) 14 Cal.App.4th 997, 1004-1005

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[13] The trial court ruled, "Two reasons I find [evidence of the prior conviction] admissible: I find it admissible under [section 28, subdivision (d), of article 1 of the California] Constitution which says all relevant evidence is admissible and it is admissible in point of fact since the defense's argument is that he does not have the ability to form a specific intent. Number two reason I find it admissible: When the defendant entered a plea, he admitted all the elements of the offense and one element of the offense is specific intent and, therefore, it is admitted by the defendant." The trial court later reaffirmed its ruling, reasoning the prior conviction "goes to the gravamen of the defense of the defendant's inability, alleged inability, to form a specific intent."

[14] Evidence Code section 1101, subdivision (b), provides, "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether the defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act

["Evidence of prior offenses is not admissible simply as character evidence, i.e., to show a propensity to commit crimes in general or a particular class of crimes"].) Rather, the evidence was relevant and admissible to rebut Dr. Kowell's testimony that Brown had impulse control problems and the defense's ensuing argument that he lacked the specific intent necessary for a robbery conviction and a true finding on the special allegation under section 667.61, subdivision (d)(2). (*People v. Carter* (2005) 36 Cal.4th 1114, 1166 ["all relevant evidence is admissible unless excluded under the federal or California Constitution or by statute. [Citations.] Relevant evidence is . . . [that] 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' The test of relevance is whether the evidence tends '"logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive'"].) The jury was specifically instructed to consider the evidence only as it related to the issue of Brown's specific intent for the robbery and One Strike allegation,[15] an issue Brown made relevant by his defense at trial. (See *Carter*, at pp. 1166-1167 [trial court has broad discretion in determining relevance of evidence]; *People v. Sanders*, *supra*, 11 Cal.4th at p. 512 ["'trial court is vested with wide discretion in determining relevance'"].)

Brown's argument fares no better under Evidence Code section 352.[16] A trial court should not exclude highly probative evidence unless the undue prejudice is unusually great. (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 402.) "Undue

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did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

[15] The trial court instructed the jury, "Certain evidence was admitted for a limited purpose. Evidence of the conviction of Vehicle Code section 10851 may be considered by you as to whether the defendant has the capacity to form a specific intent."

[16] Evidence Code section 352 provides, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate an undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

prejudice" refers not to evidence that proves guilt, but to evidence that prompts an emotional reaction against the defendant and tends to cause the trier of fact to decide the case on an improper basis: "The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. . . .'" (*People v. Karis*, *supra*, 46 Cal.3d at p. 638.) A trial court's determination pursuant to Evidence Code section 352 likewise is reviewed for an abuse of discretion. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1118.)

As the trial court found, evidence of the prior felony conviction for a specific intent crime rebutted Brown's defense he lacked the capacity to form the specific intent necessary to convict him of robbery or to find true the One Strike allegation. By pleading guilty to unlawful taking or driving a vehicle under Vehicle Code section 10851, Brown admitted the elements of the crime, including the requisite specific intent. (*People v. Enos* (1973) 34 Cal.App.3d 25, 40-41 ["A voluntary plea of guilty is the equivalent of a conviction of the crime and includes an admission of every element of the crime"].) Thus, the probative value of the evidence was high. Moreover, the conviction was from February 2001, fairly close in time to the instant offenses. In fact, Brown was on parole for the prior conviction at the time he raped Jessica and stole her purse. Furthermore, the nature of the prior conviction -- unlawful driving or taking a vehicle -- was not likely to inflame the jury and sway it to convict Brown of the rape and robbery of Jessica. In addition, as explained, the trial court guarded against the possibility of undue prejudice by appropriately limiting the jury's use of Brown's prior felony conviction to the specific

intent issue on which it was relevant; and it is presumed the jury followed the court's instruction. (*People v. Sanchez*, *supra*, 26 Cal.4th at p. 852.)[17]

5. *Imposition of the Upper Term on Count 4 and Consecutive Terms on the Rape and Robbery Convictions Did Not Violate Brown's Right to a Jury Trial*

In sentencing Brown the trial court imposed the upper term of five years on the robbery charged in count 4 and elected to impose consecutive terms on the rape charged in count 1 and the robbery charged in count 4.[18] (§§ 669, 1170; see § 667.61, subd. (g)

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[17] Based on our rejection of Brown's claims of error, we necessarily reject his contention cumulative errors and resulting prejudice mandate the reversal of his conviction for the robbery charged in count 4 and the striking of the jury's true finding on the special allegation under section 667.61, subdivision (d)(2).

[18] The trial court explained it selected the upper term on count 4 because "the victim was particularly vulnerable. Not only was she deaf, she was 16 years of age." (See Cal. Rules of Court, rule 4.421(a)(3).) In general, in sentencing Brown the trial court stated, "I heard the trial. I heard the evidence. This was one of the worst rape cases I ever heard. This young girl was 16 years old. She was deaf. She was helpless. She was a beautiful young girl, too, in point in fact. The photographs of the beating that the defendant committed, the beating, specifically, he did to the face was so great that when I looked at the photographs, which I did after the jury came back with their verdict, I did not recognize her as the person who testified in the courtroom. Her face was swollen out of shape. There were contusions, black eyes. There was no way I could possibly have depicted that individual who testified as the individual who the defendant beat and raped. The enormity of the crime is almost too overwhelming to consider. She was walking on the street, just having sold candy to get some money for herself, in the daytime, and the defendant accosts her, talks to her, and in a very crude manner asks her to have sex with him in the daytime. She doesn't know him. She tries to get away. She walks and she goes down this alley because she knows a friend of hers frequents a garage there. Unfortunately, she gets in the garage, and there are two male Hispanics but her friend isn't present. And the male Hispanics do not, in fact, help her. She may have hoped that they were going to help here, but they do not, in fact, help her, and point out to the defendant where she is as she's hiding behind a couch. He beats her in the face with his closed fists and takes her, either physically or not, out of the garage. She runs. He grabs her. He drags her to the secluded part of the alley, and in broad daylight in a public place, somewhat secluded by this fencing around them, takes all her clothes off. This is a 16-year-old child who's deaf. And then he rapes her and then he robs her, and then he leaves her beaten, raped, and robbed in broad daylight, naked. There are not many words that one can use to describe an individual like that, but none of them are nice. Therefore,

[One Strike law does not require consecutive sentencing for additional, nonsexual offenses; "[t]erms for other offenses committed during a single occasion shall be imposed as authorized under any other law, including Section 667.6, if applicable"].) Brown contends the trial court's imposition of the upper term on count 4 and consecutive terms on counts 1 and 4 based on factual determinations made by the court, not the jury, violated his right to a jury trial under *Blakely, supra*, 542 U.S. at page 301, in which the United States Supreme Court reaffirmed its holding in *Apprendi v. New Jersey* (2000) 530 U.S. 466 that, "'other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt . . . .'" (See also *United States v. Booker* (2005) 543 U.S. 220 [125 S.Ct. 738, 160 L.Ed.2d 621.)

The contention a defendant's constitutional right to a jury trial is violated by the trial court's identification of aggravating factors and imposition of an upper term was rejected in *People v. Black* (2005) 35 Cal.4th 1238, 1244, in which the California Supreme Court held "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*Id*. at p. 1244.) As the Court explained, "The jury's verdict of guilty on an offense authorizes the judge to sentence a defendant to any of the three terms specified by statute as the potential punishments for that offense, as long as the judge exercises his or her discretion in a reasonable manner that is consistent with the requirements and guidelines contained in statutes and court rules." (*Id*. at pp. 1257-1258.) According to the Court, the same reasoning applies to a trial court's decision to sentence consecutively. (*Id*. at pp. 1261-1264.)

Brown does not contend the trial court exercised its discretion in an unreasonable fashion or the sentence imposed was in any way inconsistent with the requirements of the

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it is the intention of this court to sentence the defendant to the highest term that the law allows on this case."

Penal Code or the California Rules of Court.[19] *Blakely*, therefore, provides no basis to set aside or modify Brown's sentence. However, while this case was pending on appeal, the United States Supreme Court granted certiorari in *People v. Cunningham* (Apr. 18, 2005, A103501 [nonpub.opn.], certiorari granted *sub nom. Cunningham v. California* (Feb. 21, 2006) ___ U.S. ___ [126 S.Ct. 1329, 164 L.Ed.2d 47], a case involving the effect of *Blakely*, *supra*, 542 U.S. 296 and *United States v. Booker*, *supra*, 543 U.S. 220 on California sentencing law. Accordingly, although we deny Brown's *Blakely* claim under the authority of *Black*, we do so without prejudice to any relief to which he might be entitled based on the United States Supreme Court's decision in *Cunningham*.

6. *Brown Is Entitled to 859 Days of Actual Custody Credit*

A defendant is entitled to credit for all days spent in custody from the date of arrest to the date of sentencing. (§ 2900.5.) Brown was arrested on July 25, 2003 and sentenced on November 29, 2005, entitling him to 859 days of actual custody credit. Because the trial court awarded Brown only 858 days of actual custody credit,[20] we

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[19] Brown contends in one sentence of his opening brief the trial court failed to state any reasons for its decision to sentence him consecutively. However, Brown did not object to his sentence on that ground in the trial court. Moreover, other than the passing reference in his opening brief, Brown fails to argue on appeal he is entitled to any relief based on a purported failure of the trial court to state its reasons for imposing consecutive terms, choosing instead to limit his challenge to the imposition of consecutive sentences to an alleged *Blakely* violation. Accordingly, Brown has forfeited any challenge to the imposition of consecutive sentences based on an alleged failure of the trial court to state reasons for its sentencing choice. (*People v. Gonzalez* (2003) 31 Cal.4th 745, 755-756 [failure to object to discretionary sentencing choices in trial court forfeits issue on appeal]; *People v. Neal* (1993) 19 Cal.App.4th 1114, 1117-1124 [challenge to sentence based on trial court's failure to state reasons for consecutive sentences forfeited on appeal when no objection made in the trial court]; *People v. Stanley* (1995) 10 Cal.4th 764, 793 ["'[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. [Citations.]' [Citations.]"].) In any event, the trial court's general statement in sentencing Brown sets forth reasons for imposing consecutive sentences on the robbery and rape convictions. (See fn. 18 above.)

[20] As the People acknowledge, the error apparently resulted from the failure to include February 29, 2004 -- leap day -- in the calculation.

modify his sentence to reflect 859 days of actual custody credit and order the abstract of judgment corrected. (*People v. Taylor* (2004) 119 Cal.App.4th 628, 647 [incorrect calculation of legally mandated custody credit is an unauthorized sentence that may be corrected at any time].)

7. *The Court-security Fee Need Not Be Stricken*

In sentencing Brown the trial court imposed a $20 court-security fee. (§ 1465.8, subd. (a)(1) ["To ensure and maintain adequate funding for court security, a fee of twenty dollars ($20) shall be imposed on every conviction for a criminal offense, including a traffic offense, except parking offenses . . . ."].) Brown contends the fee must be stricken because the offenses for which he was convicted were committed before the effective date of the statute and the statute does not expressly provide it is to apply retroactively. (See § 3 ["No part of [the Penal Code] is retroactive, unless expressly so declared"].)

In *People v. Wallace* (2004) 120 Cal.App.4th 867 Division Five of this court held imposition of the $20 court-security fee on a defendant whose crimes were committed prior to the effective date of section 1465.8, subdivision (a)(1), did not violate federal or state ex post facto principles because the minimal fee is nonpunitive and furthers the purpose of the statute to "insur[e] appropriate funding levels for court operations and providing a more rational process for planning court security." (*Wallace*, at p. 878.) Subsequently, Division Two of the First District held that, apart from ex post facto principles, the court-security fee as imposed on a defendant whose crimes were committed before the effective date of section 1465.8, subdivision (a)(1), "attached a new legal consequence to, and increased [the defendant's] liability for, conduct that occurred before [the statute] became effective" and, therefore, could not be applied retroactively. (*People v. Carmichael* (2006) 135 Cal.App.4th 937, review granted May 10, 2006 (S141415) (*Carmichael*).) Division One of the First District then addressed both the ex post facto and retroactivity issues and declined to strike imposition of the fee on either ground. (*People v. Alford* (2006) 137 Cal.App.4th 612, review granted May 10, 2006 (S142508) (*Alford*).) With respect to the retroactivity issue, the court in *Alford* concluded, "The last act or event necessary to trigger the legal consequence of the court

security fee was defendant's conviction, although that was of course necessarily dependent upon his earlier commission of the offense. More importantly, as we have observed, the purpose and impact of section 1465.8 are nonpunitive: to promote and fund court security, when necessary. [Citation.] And because the court security fee does not constitute punishment for past crimes, we do not perceive any unfairness that attends the lack of notice of a change in the law following the commission of the offense. [Citation.]"[21] (*Alford*, at p. 624.)

We believe the better approach to the retroactivity issue is that taken by the appellate court in *Alford*. Because it was Brown's conviction that triggered imposition of the fee and section 1465.8, subdivision (a)(1), serves the nonpunitive purpose of promoting and funding court security, the statute need not expressly state it is to be applied retroactively in order for the fee to be imposed on a defendant whose crimes were committed prior to its effective date. In rejecting Brown's request to strike imposition of the court-security fee, however, we do so without prejudice to any relief to which he may be entitled based on the Supreme Court's opinion in *Alford*.

DISPOSITION

The judgment is modified to reflect an award of 859 days of actual custody credit. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

PERLUSS, P. J.

We concur:

JOHNSON, J. WOODS, J.

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[21] In granting review of *Alford* and *Carmichael*, the Supreme Court stated it would address in *Alford* whether "the trial court security fee mandated by Penal Code section 1465.8 [can] be imposed on a defendant who committed his or her crime before the effective date of the statute without violating the state and federal constitutional prohibitions against ex post facto laws"; the Court deferred briefing in *Carmichael* pending its decision in *Alford*.