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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM LEWIS, Defendant and Appellant.	B152939 (Los Angeles County Super. Ct. No. KA051229)

APPEAL from the judgment of the Superior Court of Los Angeles County. Francis A. Gately, Judge. Affirmed in part and reversed in part.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Victoria B. Wilson and Jim E. Hart, Deputy Attorneys General, for Plaintiff and Respondent.

William Lewis appeals from the judgment entered upon his conviction by jury of assault by means likely to produce great bodily injury, kidnapping, and forcible rape (Pen. Code, §§ 245, subd. (a)(1), 207, subd. (a), 261, subd. (a)(2)), with the finding that, in the commission of the rape, he was engaged in the crime of kidnapping (Pen. Code, § 667.61, subd. (b)). He admitted a prior serious felony conviction within the meaning of Penal Code section 667, subdivision (a) and the three strikes law (Pen. Code, §§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)) and a prior felony conviction for which he served a prison term within the meaning of Penal Code section 667.5, subdivision (b).[1] He was sentenced to 30 years to life plus 18 years in prison, comprised of five years for kidnapping, which was doubled under the three strikes law, one year for assault, doubled under the three strikes law, six years for the prior conviction enhancements, and 15 years to life for forcible rape under the one strike law, section 667.61, which was also doubled under the three strikes law.

Appellant contends that (1) the trial court erred in ruling on his *Marsden* (*People v. Marsden* (1970) 2 Cal.3d 118) motions; (2) the trial court erred in refusing to admit good-character evidence as to his prior guilty pleas or, alternatively, the trial court abused its discretion in admitting numerous prior convictions for impeachment purposes; (3) the trial court erred in failing to instruct the jury sua sponte on reasonable and good faith belief in consent as to the rape charge; (4) the trial court erred in failing to instruct the jury sua sponte with CALJIC No. 10.61.1 on the victim's prior sexual conduct; (5) the trial court erred in giving CALJIC No. 2.62 on appellant's failure to explain or deny; (6) the 10-year sentence imposed for kidnapping must be stayed pursuant to section 654 because it was based on the same act as the section 667.61, subdivision (b) enhancement; (7) section 667.61, subdivision (b) is an enhancement not subject to the doubling provision of the three strikes law; (8) his sentence constitutes cruel and unusual

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[1] Unless otherwise specified, all further statutory references are to the Penal Code.

punishment under the circumstances of this case; and (9) cumulative error requires reversal.

We requested that the parties address the issue of whether appellant's admission of the prior conviction allegation was voluntary and intelligent within the meaning of *People v. Howard* (1992) 1 Cal.4th 1132.

In addition, we requested that the parties address the matter of the effect, if any, of section 667.1, subdivision (f) on the issue of whether the sentence for kidnapping was properly imposed.

We strike the 10-year term for kidnapping, remand the matter for resentencing and for proceedings on the prior conviction allegations, and otherwise affirm the judgment.

FACTS

The prosecution evidence established that appellant and Terrese F. began dating in January 2000. The relationship became serious by August and they became engaged to be married in October 2000. They had engaged in sex on four occasions. In mid-October, Terrese broke off their engagement, but by the date of the instant offenses, she was again wearing the diamond engagement ring appellant had given her.

On the evening of October 19, 2000, appellant picked up Terrese and took her to Knotts Berry Farm, where they were to meet appellant's cousins, but they left soon after they arrived because Terrese was afraid of "Knott's Scary Farm." Appellant drove her to his residence in Walnut, first stopping to buy some wine and a rose. Appellant lit candles and Terrese removed her overalls and lay under the covers as they watched television in his room. Appellant tried to give her a massage, but she told him she did not want him to. She put on her overalls and stated that she had to go home because she had to get up at a certain time the next morning.

Appellant told her he was angry, and Terrese said she needed time to herself. She believed that appellant assumed she was attempting to break up with him. Although his roommates were in the house, he jumped on top of her and tried to remove her overalls. She yelled, and he covered her mouth. She struggled with him, and eventually he

stopped and said he would take her home. He took from her the engagement ring and a cell phone he had given her and put them in a drawer. She told him he could keep the ring and concluded that he had ended their relationship.

Terrese walked out of appellant's residence, intending to go to a pay phone and summon a ride or call the police. Appellant followed her out and told her to get into his car. When she refused, he forced her into the car, sat on her, and shut the door, injuring her knee in the process. Although he said he would take her home, a five-minute drive to West Covina, he began driving and eventually told her he was not taking her home. Despite her repeated pleas to be taken back to her residence, he drove onto the 60 Freeway. As he drove, he tried to unbuckle her overalls and placed his hand inside her pants. Terrese tried to grab the steering wheel in an attempt to pull over and escape, and honked the horn to get attention. They continued to argue, appellant wanting to have sex with her and Terrese wanting to get out of the car and go home. Appellant grabbed her hair, unbuckled his own overalls, and tried to force her head down on his lap.

Appellant drove onto the 605 Freeway, then to the 10 Freeway, the 57 Freeway and the 210 Freeway. He told Terrese he was angry because he could not get his way, mentioning sex and people taking advantage of him and his being tired of being nice to people. When she asked him why he was doing this and told him he had a good career, he said he had been in jail before and did not care. He then drove to his cousin's apartment in Azusa, stating he was going to pick up his mail.

Appellant parked in a dimly lit, deserted parking area. He continued to complain about not getting his way. Terrese hugged him for approximately three minutes, hoping this would "pacify" him so she could get out of the car, because she had to go to the bathroom. She did not hug him as a gesture of affection. She told appellant she had to go to the bathroom, but he told her she did not have to go.

Appellant then asked Terrese to turn toward the window, said, "Sorry," and began choking her with his arm around her neck. Although she tried to scream and kick the window out, her circulation was cut off and she began to lose her breath. Appellant then

put both hands around her throat from behind, applying a great deal of pressure, and put her face between the seats. Her nose began bleeding severely and she began losing her ability to hear. She was afraid he was going to kill her. Appellant slightly loosened his hold on her neck and asked if she would do what he said. She understood that that meant having sex, and she nodded her head because she could hardly breathe and feared for her life. Appellant let her get up. He pulled down his overalls and said he wanted her to do something for him. Although she said, "No," he pushed her head into his lap and forced her to orally copulate him.

Appellant then "went back to the point of him trying to get [Terrese to] go back to the house with him and sleep with him." She had agreed to have sex with him while he was strangling her so he would take his hands off her neck, not because she wanted to have sex with him, and she asked if he could wait another day. He said, "No." She agreed to go, although she did not want to have sex with him either then or on any other day, just so she could get away and to keep him from hurting her any further. She did not say anything on the 20- or 25-minute drive back to his house on surface streets, because she was "sitting there scared and still in shock." She only recalled stopping at one red light and although she saw a police officer there, when she looked again the police vehicle was gone, and she did not open the car door and run out because she was afraid of being hurt again.

When they arrived at appellant's house, at approximately 2:00 a.m., he cleaned some blood off her face and they approached the door. He did not have his key and his housemate, Lee, opened the door. Lee, who was half awake, did not pay any attention to Terrese as they entered. Terrese went to the bathroom and cleaned more blood from her face. She considered running from the bathroom to the front door, but she had to pass appellant's room and appellant was in his room waiting for her in his underwear. Appellant lit some candles and they then engaged in sexual intercourse. She did not yell for help, because appellant had already attacked her earlier that evening when Lee and his

wife were in the house, and she did not think appellant would have hesitated even if she had tried to involve them.

Terrese explained that she had sex with appellant "[b]ecause he had asked me to in the car when he was choking me in the car and then on the way back to the house." She stated, "I guess I felt that was my only way ever getting away from him and returning back home," and that her fear was "based on the beginning of me not sleeping with him in the first place before the whole incident took place and in the car when he was choking me and asking me to sleep with him still," which occurred only 20 or 25 minutes before she finally had sex with him. She had not made up with him after he choked her.

After they engaged in sex, appellant put the engagement ring back on her finger, although she said she did not want it and was not going to marry him. She did not resist so as to avoid another dispute.[2]

Appellant drove Terrese home from his house at approximately 4:00 a.m. Her mother, who was waiting up for her, saw that her face, nose and jacket were bloody. Terrese told her mother that appellant had tried to kill her. She did not tell her mother that she had been raped because she was embarrassed, but after she took a shower she told her mother that appellant had choked her and raped her. She did not want to report the matter to the police, believing that appellant would not be prosecuted for rape because they were engaged. However, she requested a restraining order against appellant. When an officer asked what had happened to her face, she reported the attack.

Terrese was taken to the U.S.C. Medical Center, where she was examined by Gina McConnell, a registered nurse who specialized in sexual assault and who testified as an expert witness. McConnell observed that Terrese had bilateral subconjunctival hemorrhages, which meant bleeding under both conjunctiva, a sign that she had been

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[2] She subsequently received a bill from the jeweler for the as yet unpaid-for ring. She pawned the ring in February 2001 to pay bills resulting from the assault and because she no longer wanted it.

choked. McConnell testified that "to get the kind of hemorrhage like that, there would have to be enough of a force that would block the return of blood flow from the brain to the heart. So it would have to be a constricting injury to prevent that blood clot. [¶] . . . [¶] You would have to push pretty hard to cause that kind of pressure." An individual most likely could not inflict that kind of injury upon herself. McConnell further testified that blood coming from the nose was common with severe strangulation.

McConnell also saw bruising on Terrese's hip, knee and elbow which had occurred within the previous 72 hours. Terrese had abrasions and irritated tissue at the entrance to her vaginal area, which McConnell testified was common in sexual assault cases and was consistent with forced penetration. This could also be consistent with consensual sex. There was evidence of a lack of lubrication, which was consistent with force or with a couple having had sex after an argument. Terrese's injuries were "very consistent" with her report that she had had nonconsensual sex. McConnell testified that sex occurring 45 minutes after the victim was choked almost to the point of unconsciousness would be forcible rape.

Police officers went to appellant's residence to arrest him. Although they knew he was inside, they received no answer when they knocked and announced their presence at the door or when they called him on the telephone. Appellant's housemate eventually permitted the officers to enter. The officers found appellant sitting in a closet. Appellant subsequently waived his rights under *Miranda v. Arizona* (1966) 384 U.S. 436. He stated that when he and Terrese returned to his house from Knott's Berry Farm, they argued over the possibility of her having an affair.[3] She asked him to take her home. As he drove to pick up some mail in Azusa on his way to driving her home, she tried to grab the steering wheel as they argued in the car. He pushed her away, to maintain control of the

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[3] Prior to appellant's testimony, Terrese was recalled to testify with respect to three inquiries posed by the jury. She stated that she and appellant never had any argument concerning either of them seeing someone else.

car, and he then noticed her nose was bleeding. When he parked in Azusa, they argued and she continued to yell, so he grabbed her neck and shook her to "knock some sense into her." He stated that he loved her and did not intend to choke her. They made up and embraced, and they agreed to go back to his house. Back in his room, they embraced and "made love." He denied asking or forcing her to orally copulate him. He explained that when the police came to his house, he refused to open the door because he was afraid of them.

Further evidence established that appellant called Terrese's mother from jail and said that he loved Terrese and that he had "lost it" the previous night but that he would never hurt her. He sent Terrese a letter in which he asked for her forgiveness and did not deny that he raped her. Appellant telephoned her in January 2001, telling her that he did not want to serve any time in jail and that if he had to go to jail, he would "hurt somebody" when he got out. In several other calls, he tried to get her to drop the charges. She acknowledged that in December 2000, after she had received one letter from appellant and he had called her a few times, she had written to him saying that she missed him for the holidays. She testified that she had written this because it was what he wanted to hear. She had also written that she wished she could trust him and feel safe around him, based both on his conduct that night and on his aggressive attitude the week before the offenses.

Testifying on his own behalf, appellant denied kidnapping Terrese or forcing her to have sexual intercourse or to orally copulate him that evening. He stated that he and Terrese had been in a relationship for eight months before the incident occurred and they had engaged in sex more than 10 times. In early October 2000, he gave her an engagement ring worth nearly $2,400, and she agreed to marry him. She had never called off the engagement prior to the night of the incident.

On October 19, 2000, after appellant bought Terrese a pair of designer overalls and spent $80 on tickets to Knott's Berry Farm, Terrese said she was scared and did not want to stay. He was upset about losing the ticket money and they argued, but they went

back to his house, first stopping at a store where he bought her roses and some wine. At his house, he lit candles and she took off her overalls as they watched television on his bed. When she told him she wished they had gone to Disneyland, he became angry, concluding that he was being used, and he took the ring from her finger and said the engagement was over. He put the ring and a cell phone he had given her into a drawer.

When appellant and Terrese went outside, they yelled at each other about the ring and Terrese said she would not get into his car without the ring and cell phone. However, he claimed she got into his car voluntarily. He told her he was going to pick up his mail at his cousin's house and then drive her home. As he drove, she hit him and tried to take over the steering wheel. He pushed her away, touching her neck and causing her face to hit the window. She tried to kick out the door and window and told him that her nose was bleeding. He did not see any blood but told her to get a shirt from the back seat to wipe her nose.

In the parking lot of appellant's cousin's residence, the two argued and called each other names. Terrese angrily told him she could ruin his life and career, but he took this as a joke. She swung at him, trying to hit his head, so he grabbed her for a minute or minute and a half and shook her at her collarbone, acting in self-defense. He explained that this was "in the heat of . . . argument" and he "just react[ed]." He was not trying to choke her. At trial, he demonstrated his actions, indicating that she was facing him and his hands were on her upper chest, fingers near the top of her shoulders, and thumbs in the middle of her sternum. His fingers ended up on her Adam's apple but to his knowledge he had not applied pressure to her neck area.

Terrese told him that her nose was bleeding again. He saw blood on the car seat and said he was sorry. Crying, she said she was sorry, too, and she hugged him. He told her he was going to take her home but she said she wanted to go to his house, make up, and make love. They agreed to go back to his house and discussed their relationship, and she repeatedly told him that they could make it work.

At approximately 2:00 a.m., they drove back to appellant's residence, stopping about four times at red lights. Lee, appellant's housemate, let them in. Terrese went to wash up in the bathroom, although appellant saw no blood on her, and she then joined him in his bedroom, where they "made love."

He drove her home at approximately 3:00 a.m. and they hugged and kissed some more. Appellant understood that the engagement was off but that they were going to try to work things out. He later found that the engagement ring was missing from the drawer where he had put it.

When the police knocked on the door, appellant attempted to avoid them because of a prior bad experience and, when they called him on the phone, he lied to them about his whereabouts. He did not know what they wanted and "never thought it was because of the argument me and Terrese had." He was charged with attempted murder but never told the detective who spoke to him that Terrese had hit him or that he had acted in self-defense, although he stated that he grabbed Terrese and shook her to get her to stop, and he did not tell the detective that Terrese had told him she could ruin his life. He acknowledged that he had written to her although there was a restraining order which stated he was to have no written contact with her.

Appellant and Terrese agreed in their testimony that their relationship had become strained in the week preceding the offenses. They also agreed that on the ride to appellant's home from his cousin's residence, neither of them spoke much.

Appellant acknowledged two prior convictions each of grand theft, grand theft of a vehicle, grand theft of an access card, theft by deception, and burglary. He conceded that he had lied on his job application for the executive chef position he held at the time of the offenses, in that he had not listed these prior convictions on the application.

Lee Ditterline, appellant's boss and housemate, testified that when he let appellant and Terrese in the early morning hours, Terrese did not appear to have any problems and he did not see any blood on her. Appellant and Terrese went directly to appellant's bedroom.

In rebuttal, the detective who interviewed appellant testified that appellant never stated that Terrese had hit him before the alleged choking incident. A deputy who was present at an interview with Terrese shortly after the offenses testified he saw a large red area from her chin to the bottom of her throat and redness on her jaw line under the chin, which were consistent with her version of the attack.

PROCEDURAL BACKGROUND

Appellant was originally charged with assault by means likely to produce great bodily injury. The prosecutor offered a sentence of four years in return for a guilty plea, informing appellant that he would refile the case and add the remaining charges if appellant did not accept the plea bargain. The trial court advised appellant that in view of the other offenses which had not been charged, and the potential sentence he would face if convicted of those charges, this plea bargain was "like the biggest Christmas present anybody was ever offered." However, appellant declined the offer. An information was then filed in the present case, charging him with assault, assault with intent to commit rape or oral copulation, kidnapping, forcible oral copulation, and forcible rape. Appellant declined an offer of a seven-year term in return for a plea based on this information. The jury found him guilty of assault, kidnapping, and forcible rape, and not guilty of assault with intent to commit rape or oral copulation or of forcible oral copulation.

DISCUSSION

I. Appellant's requests to substitute counsel

On January 25, 2001,[4] the judge in the master calendar department, department F, transferred the original assault case, case No. KA050272, for trial to department P. In department P, after the prosecutor indicated he had offered appellant a four-year term if appellant would plead guilty to assault, appellant informed the trial court he wished to continue the matter to bring in retained counsel. The trial court ruled that the request was

not timely, since counsel had not appeared in court to request a continuance and had not even returned the trial court's call. Appellant's appointed counsel indicated that he believed appellant wanted to make a *Marsden* motion. The court informed appellant that a *Marsden* motion was "simply if there is a conflict between your present attorney where he can't represent you," such as the situation where counsel had represented the complaining witness in another matter. In the presence of the prosecutor, the court asked appellant for his reason for wanting to relieve appointed counsel.

Appellant stated that "evidence to help [his] case ha[d] not been obtained yet" and referred to files in the police department in West Covina. The court observed that a return on appointed counsel's subpoena stated that the information sought could not be found there. Counsel stated that appellant had just informed him that there was another name under which the documents, apparently pertaining to Terrese F., might be found.

The trial court stated, "Mr. Lewis, I don't have too much sympathy, based on just what I've read in this report of your conduct and the potential conduct that could be brought against you. [¶] What I am saying is if you want to enter a plea to the charge that's here, fine. If you don't, then if the district attorney moves to dismiss the case, I'm going to dismiss it and you'll have plenty of time to get an attorney, cuz it's going to start all over again, new preliminary hearing and everything else. But if you're convicted, you're going to be looking at the rest of your life in prison. [¶] . . . And you're being offered four [years]. You either take the four at 1:30 or the case will be dismissed and we'll start all over again. That's it."

That afternoon, case No. KA050272 alleging assault was dismissed. The court informed appellant, "[I]f you want to have a new attorney, what will happen on it is this, is that you'll be arraigned on the new [c]omplaint, and the matter will be set for preliminary hearing, and then it has to be set for trial within 60 days. So from today

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4 Unless otherwise indicated, all subsequent dates mentioned in the discussion of this issue occurred in 2001.

you'd have probably pretty close to three months before the matter came up to trial again. So you've got all that time to hire a new attorney, and if you do, why, [appointed counsel] will be relieved, but until that time -- well, at this time -- " Counsel interjected, "It may be reassigned." The court concluded, "It could be reassigned to somebody else. And so your attorney is relieved and this case is dismissed . . . ."

On February 20, in department N, with appellant present in court, the new information was filed charging five counts. The same attorney was appointed to represent him. He was arraigned on the new information and entered not guilty pleas. A pretrial conference was scheduled for March 8. On March 8, appellant was present in lockup and the matter was set for readiness conference on March 29. On March 29, with appellant present in court, a motion for continuance was granted and the readiness hearing was set for April 24, with trial set for April 26. On April 24, appellant was present in court, a motion for continuance was granted and the readiness hearing was set for May 11, with trial set for May 15. On May 11, with appellant present in lockup, the readiness conference was held and trial remained set for May 15. These hearings were all held in department N and no reporter's transcripts for these hearings are included in the record.

On May 15, the matter was called for trial in department 3. The prospective jurors were administered the oath and the matter was continued to the next day. The next morning, May 16, while the jury panel was waiting in the hallway, the trial court placed on the record the status of plea negotiations, ascertaining that appellant had refused the offer of seven years. Defense counsel indicated that he had advised appellant to take the offer and that appellant had refused to take his advice. Appellant then informed the trial court that he had "asked for a Marsden motion which is in Division F. Judge was going to grant it next time I came into court. When I came back from my, [*sic*] I was switched from Division F to P and I have a new judge then." He explained that he had been in division F and had been told that he could "have [his] Marsden motion" when he "c[a]me back," but he was brought back to division P for one day and was then sent to division N,

and never went back to division F. He continued, "See, I have been trying to get a state appointed attorney. My life is on the line here and I don't feel comfortable with this man representing me. And I have been clearly stating that, but nobody have been helping me. I am talking to him, he has never came to see me. Every time I call him, he had nothing to say. I don't -- nothing going on with this case, what is going to happen right here. I am walking here. I don't know nothing. [¶] And my life is on the line, and he is here representing me. And all he's telling me is, ['G]o to prison, go to prison. You will be found guilty. This is Pomona court . . . . Our jury is all white. You will be convicted. You are gonna loose [*sic*] this case.['] It was never no kidnapping. This whole thing was my fiance[e]. All it was domestic argument. That's it. [¶] The argument was over an amusement park one night. That's after we made love. Why would I want to kidnap my fiance[e] after we make love over argument?"

The court asked appellant if he wanted to bring a motion to relieve his attorney. Appellant replied, "Definitely. I do. I have been wanting this since day one." The trial court asked defense counsel if any *Marsden* motion had been brought. Counsel stated he believed it had. Appellant explained that he had raised the issue before, in department F, but that he had "never had a Marsden motion" because the judge in department F "stated, when you come back to court, we can make that motion for the Marsden motion, but I never went back into his court." The trial court asked appellant if he had ever renewed the motion. Appellant replied, "I was never able to. When I come to court, if I don't see the judge or I come in here, you just waived time, and we need more time to do, we can't find this person, and that's it. I wasn't able to say nothing. He knows how I feel."

Counsel stated, "Any time a client of mine says he wants state appointed counsel, which is the usual way our clients expressed they wanted to make a Marsden motion or any other way express that desire, I always immediately make that known to the judge. And that was done in this case. I can guarantee the court that. [¶] I think I know -- I remember now what Mr. Lewis is talking about. When Mr. Lewis came back on the time when he had been told that his Marsden motion would be addressed, he had changed his

mind and didn't want to bring a Marsden motion at that point, so it wasn't pursued. [¶] Mr. Lewis goes off again and on again as to whether or not he wanted me to represent him or not. And that's been the course of conduct throughout this case."

Appellant replied, "I have never said I wanted you to represent me. I never changed my mind. Never. You have not asked me since I told you to tell the judge I didn't want you to represent me. You have not asked me, ['H]ave you changed your mind?['] God as my witness you are lying. I never said I want you to represent me. [¶] . . . [¶] I am not -- I have no confidence in you. Your whole conversation to me, ['G]o to prison.['] You tell me this is Pomona, this is how they do in Pomona. This is not L.A. I never live in L.A. in my life, . . . [¶] Throughout me being incarcerated, that is how it's been. He know I never wanted him as my attorney. I advised that opinion. Especially -- I am afraid. [¶] If the whole thing was domestic argument, if I was brought a deal on the grounds of a domestic argument, I would have took it. But have me for assault, the, I never assaulted nobody, nobody for nothing. I never kidnapped no one . . . . From day one, he's forced to me to, force me to a prison deal . . . ."

The court inquired of appellant as to whether he thought it was important for an attorney to tell his client the truth in the client's best interest, even if it was news the client did not want to hear. Appellant replied affirmatively.

The trial court then ruled, "Let me indicate on the record in this case, the court is not going to entertain the Marsden motion as it being untimely."

Appellant raises several complaints regarding the January 25, 2001, hearing. These claims are not properly before us. There is no notice appeal from case No. KA050272, and for good reason, since that matter was dismissed and there is no judgment from which to appeal. (§ 1237; *People v. Joseph* (1957) 153 Cal.App.2d 548, 551; see *People v. Croxton* (1958) 162 Cal.App.2d 187, 189.)

Appellant further contends that the trial court at the May 16, 2001, hearing erroneously ruled that his request to substitute counsel was untimely and failed to entertain his motion. This claim lacks merit. Appellant was present in court on the day

counsel was appointed in the refiled case and on at least three other occasions prior to May 16.[5] Although he claimed that he had not been able to bring his motion at those times, counsel stated that "[a]ny time a client of mine says he wants state appointed counsel, which is the usual way our clients expressed they wanted to make a Marsden motion or any other way express that desire, I always immediately make that known to the judge. And that was done in this case. I can guarantee the court that." He further stated, "When Mr. Lewis came back on the time when he had been told that his Marsden motion would be addressed, he had changed his mind and didn't want to bring a Marsden motion at that point, so it wasn't pursued. [¶] Mr. Lewis goes off again and on again as to whether or not he wanted me to represent him or not." The trial court was entitled to accept counsel's statement. (*People v. Smith* (1993) 6 Cal.4th 684, 696.) Appellant's May 16 request was made on the second day of trial, after the jury was administered the oath and just as jury selection was about to commence. Such a motion is untimely (*People v. Shoals* (1992) 8 Cal.App.4th 475, 495, 497), and we find no abuse of discretion in the trial court's ruling on the ground of untimeliness.

II. Evidence of appellant's prior guilty pleas as good character evidence and as impeachment evidence

Before appellant took the stand, the trial court considered whether he could be impeached with evidence of his prior convictions. The prosecutor indicated that appellant had two 1990 or 1991 convictions each of grand theft of a vehicle and grand theft of an access card, two 1992 convictions of grand theft of property, and a 1992 conviction of first degree burglary, all felonies sustained in California, as well as a 1985 conviction of larceny, a 1990 conviction of fraudulent use of a credit card, 1996 convictions of theft by deceit and fraudulent use of a credit card, and a 1995 conviction of burglary, all felonies sustained in New Jersey. Defense counsel argued that although

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5 As appellant acknowledges, the refiled case is not a continuation of the dismissed

all the convictions involved crimes of moral turpitude, they were too remote in time and therefore too prejudicial to be allowed for impeachment. The prosecutor conceded that the 1985 conviction was too remote. The trial court permitted impeachment use of the remaining convictions, each of which had been sustained within the prior 10 years.

On direct examination, defense counsel asked appellant whether he had suffered 10 of these prior convictions, and whether they were all theft-related matters. Appellant replied affirmatively. Counsel then asked, "On all of these convictions, did you ever request a trial?" Appellant replied, "No." Counsel asked, "Did you plead guilty to all?" The prosecutor objected on the ground that this was irrelevant. The trial court sustained the objection. A conference was held which was not reported, and the trial court then admonished the jury, "Objection is sustained, answer is stricken. Jury is to disregard."

Appellant contends that the trial court prejudicially erred in refusing to permit introduction of good-character evidence of his guilty pleas or, alternatively, that the trial court abused its discretion in admitting evidence of the numerous prior convictions because this constituted prosecutorial "overkill" in a credibility-based case.

Apart from the absence in this record of any showing by appellant as to the relevance of the proposed testimony, which constitutes waiver of the issue on appeal (*People v. Price* (1991) 1 Cal.4th 324, 488; *People v. Hendricks* (1992) 11 Cal.App.4th 126, 133), this first claim must fail.[6]

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case. (*Paredes v. Superior Court* (1999) 77 Cal.App.4th 24, 34.)

[6] Appellant asserts that the evidentiary ruling may have violated his right to due process, implicating the *Chapman* (*Chapman v. California* (1967) 386 U.S. 18) standard of review. This ruling did not substantially implicate his constitutional rights. (*People v. Davis* (1995) 10 Cal.4th 463, 501-502, fn. 1.) Moreover, since the prosecutor's objection was sustained on relevance grounds, and no Evidence Code section 352 objection appears in the record, the trial court was not required to reach the issue of whether the evidence was more prejudicial than probative. (*People v. Fierro* (1991) 1 Cal.4th 173, 238.)

On appeal, appellant asserts that his testimony in response to the question whether he pled guilty to each of his prior convictions was intended to rehabilitate him with good character evidence and evidence of his truth and veracity, by showing that he accepted responsibility for his past crimes. This, he claims, would serve to distinguish his prior cases from the instant case. Even if we accept this assertion, this evidence merely would have produced a speculative inference. A defendant may have many reasons to enter a guilty plea other than an acknowledgement or consciousness of guilt, and the further inference that the defendant must then be innocent if he pleads not guilty is even more speculative. For that reason, such evidence is irrelevant and was properly excluded. (*People v. Babbitt* (1988) 45 Cal.3d 660, 681-682; *People v. De La Plane* (1979) 88 Cal.App.3d 223, 242-245, disapproved on other grounds in *People v. Green* (1980) 27 Cal.3d 1, 39, fn. 25.)

Moreover, there was no abuse of discretion in the trial court's ruling permitting the prosecutor to impeach appellant with numerous prior felony convictions. As defense counsel acknowledged, each prior conviction involved moral turpitude. Most of the prior convictions were for similar theft-related offenses and none was similar to any of the current charges. The trial court excluded impeachment with the 1985 conviction. The remaining convictions were not remote and were not followed by a legally blameless life. (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925-926.) Particularly because this case was so heavily dependent on the jury's determination of the credibility of Terrese and appellant, appellant was not entitled to a false aura of veracity, and "a series of crimes relevant to credibility is more probative than is a single such offense." (*People v. Dillingham* (1986) 186 Cal.App.3d 688, 695.) The trial court's ruling permitting impeachment of appellant with all the convictions sustained within the prior 10 years was within the sound exercise of its discretion. (*People v. Muldrow* (1988) 202 Cal.App.3d 636, 649; see *People v. Mendoza*, *supra*, at pp. 927-928.)

III. Instruction on reasonable, good faith belief in consent as to the rape charge

The trial court instructed the jury on consent with respect to the charges of rape and forcible oral copulation in accordance with CALJIC No. 1.23.1. It did not instruct the jury that appellant was not guilty of rape if he entertained a reasonable, good faith belief that Terrese consented to have sexual intercourse, in accordance with CALJIC No. 10.65. Appellant contends that the trial court erred in failing to instruct the jury sua sponte on reasonable and good faith belief in consent as to the charge of rape. This claim lacks merit.

CALJIC No. 10.65 provides, as here relevant, "In the crime of [forcible rape] . . . criminal intent must exist at the time of the commission of the [crime charged]. There is no criminal intent if the defendant had a reasonable and good faith belief that the other person voluntarily consented to engage in [sexual intercourse] . . . . Therefore, a reasonable and good faith belief that there was voluntary consent is a defense to such a charge. [¶] [However, a belief that is based upon ambiguous conduct by an alleged victim that is the product of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person of another is not a reasonable good faith belief.] [¶] If after a consideration of all of the evidence you have a reasonable doubt that the defendant had criminal intent at the time of the [sexual intercourse] . . . you must find [him] [her] not guilty of the crime." (Original brackets.)

A trial court has a duty to instruct sua sponte on a defense "'only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.' [Citations.]" (*People v. Barton* (1995) 12 Cal.4th 186, 195.) The Use Note to CALJIC No. 10.65 states, in part, "The court is not required to sua sponte instruct on a good faith but mistaken belief of consent (where defense is actual consent and court instructs on actual consent) where defendant does not claim a good faith belief that victim consented and there is no evidence to support such a defense. (*People v. Romero*

(1985) 171 Cal.App.3d 1149, 1153.)" In this case, neither of these conditions was present.

CALJIC No. 10.65 is known as the *Mayberry* instruction. In *People v. Mayberry* (1975) 15 Cal.3d 143, 155 (*Mayberry*), the Supreme Court stated, "If a defendant entertains a reasonable and bona fide belief that a prosecutrix voluntarily consented to . . . engage in sexual intercourse, it is apparent he does not possess the wrongful intent that is a prerequisite under Penal Code section 20 to a conviction of . . . rape by means of force or threat . . . ." Accordingly, when there is substantial evidence of a defendant's reasonable and good faith mistake of fact regarding the complaining witness's consent to sexual intercourse, an instruction consistent with CALJIC No. 10.65 must be given. (*People v. Williams* (1992) 4 Cal.4th 354, 360-361 (*Williams*).)

To establish that the *Mayberry* instruction is required, the defendant must adduce evidence of the victim's equivocal conduct on the basis of which he erroneously believed there was consent (the subjective component), and the mistake regarding consent must have been reasonable under the circumstances (the objective component). (*People v. Williams*, *supra*, 4 Cal.4th at pp. 360-361.) The Supreme Court explained, "Thus, because the *Mayberry* instruction is premised on mistake of fact, the instruction should not be given absent substantial evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not." (*Id*. at p. 362.) In other words, "If the defense evidence is unequivocal consent and the prosecution's evidence is of nonconsensual forcible sex, the [*Mayberry*] instruction should not be given. [Citation.]" (*People v. Burnett* (1992) 9 Cal.App.4th 685, 690.)

The Supreme Court in *Williams* held that the evidence in that case, consisting of two wholly divergent accounts of the event, one establishing that the victim was raped and one establishing actual consent, did not warrant an instruction on reasonable and good faith belief in consent. The court stated, "These wholly divergent accounts create

no middle ground from which Williams could argue he reasonably misinterpreted [the victim's] consent." (*People v. Williams*, *supra*, 4 Cal.4th at p. 362.)[7]

In his opening statement, appellant's counsel aptly characterized the anticipated evidence, indicating that "there are two very definite different versions of this case." The parties thereafter did in fact testify to "wholly divergent accounts" of events, and based on the evidence, defense counsel then argued to the jury that Terrese was lying and that the sexual intercourse was consensual. Appellant testified that after he grabbed Terrese because she swung at him, they both said they were sorry. She hugged him and, although he said he was going to take her home, she told him she wanted to go back to his house and make love. He testified that he and Terrese then engaged in consensual intercourse. If believed by the jury, this testimony would establish actual consent. Terrese, on the other hand, testified that she had hugged appellant prior to the assault to pacify him, hoping to get out of the car to go to the bathroom, and that she only agreed to what

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[7] After finding that the evidence did not warrant the mistake of fact instruction, the court added, "We note for the guidance of the lower courts that there may be cases, as in *Mayberry*, in which there is evidence of equivocal conduct that could be reasonably and in good faith relied on to form a mistaken belief of consent, but also evidence that this equivocal conduct occurred only after the defendant's exercise or threat of 'force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.' [Citations.] No doubt it would offend modern sensibilities to allow a defendant to assert a claim of reasonable and good faith but mistaken belief in consent based on the victim's behavior *after* the defendant had exercised or threatened 'force, violence, duress, menace or fear of immediate and unlawful bodily injury on the person or another.' [Citations.] However, a trier of fact is permitted to credit some portions of a witness's testimony, and not credit others. Since a trial judge cannot predict which evidence the jury will find credible, he or she must give the *Mayberry* instruction whenever there is substantial evidence of equivocal conduct that could be reasonably and in good faith relied on to form a mistaken belief of consent, despite the alleged temporal context in which that equivocal conduct occurred. The jury should, however, be further instructed, if appropriate, that a reasonable mistake of fact may not be found if the jury finds that such equivocal conduct on the part of the victim was the product of 'force,

appellant wanted, to have sex, because he was choking her and she wanted to prevent him from hurting her any further. She testified that the ensuing sex act was not consensual. If believed by the jury, this testimony "would preclude any reasonable belief of consent. These wholly divergent accounts create no middle ground from which [appellant] could argue he reasonably misinterpreted [Terrese's] conduct." (*People v. Williams*, *supra*, 4 Cal.4th at p. 362.)

On appeal, appellant now claims that this is a "middle ground" case.[8] He states that although Terrese testified she hugged him for three minutes *before* the choking occurred, he testified that *after* he grabbed her and shook her to knock some sense into her and to get her to stop yelling, she decided to "kiss and make up," they hugged each other, and she agreed to go back to his house and make love. He argues that such evidence, particularly in light of their relationship and their history of sexual activity, warranted the mistake of fact instruction. However, as in *Williams* and in *People v. Burnett*, *supra*, 9 Cal.App.4th 685, the evidence here established either actual consent or none. There was no evidence on which a reasonable jury could have found a mistaken but good faith belief in consent based on ambiguous or equivocal conduct. On a record which established either that Terrese consented to have sex or that she was raped, there was no substantial evidence to warrant the mistake of fact instruction. (*People v. Burnett*, *supra*, at p. 690; see *People v. Balcom* (1994) 7 Cal.4th 414, 422; see also *People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1275-1276.)

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violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.'" (*People v. Williams*, *supra*, 4 Cal.4th at p. 364, italics in original.)

8 We observe that, in his opening brief, during his discussion of the impeachment issue, appellant concedes that "[i]n this case, there was a pure credibility contest with regard to the consent, or lack thereof, to sexual intercourse."

IV. CALJIC No. 10.61.1

Appellant contends that the trial court erred in failing to instruct the jury sua sponte in accordance with CALJIC No. 10.61.1 on prior consensual sexual conduct between him and Terrese. This contention is unavailing.

CALJIC No. 10.61.1 provides, "Evidence has been introduced for the purpose of showing that the defendant and [the alleged victim] engaged consensually in sexual intercourse on one [or more] occasions prior to the charge against the defendant in this case. [¶] If you believe this evidence, you should consider it only for the limited purpose of tending to show that [the alleged victim] consented to the act[s] of intercourse charged in this case] [,or] [the defendant had a good faith reasonable belief that [the alleged victim] consented to the act of sexual intercourse]. [¶] You must not consider that evidence for any other purpose." (Original brackets.)

This instruction derives from section 1127d, which provides, in pertinent part, that "if evidence was received that the victim consented to and did engage in sexual intercourse with the defendant on one or more occasions prior to that charged against the defendant in this case, the jury shall be instructed that this evidence may be considered only as it relates to the question of whether the victim consented to the act of intercourse charged against the defendant in the case, or whether the defendant had a good faith reasonable belief that the victim consented to the act of sexual intercourse. The jury shall be instructed that it shall not consider this evidence for any other purpose." The Use Note to CALJIC No. 10.61.1 states that the instruction "appears to be required in prosecutions for rape, . . . or an attempt or assault with intent to commit such crime . . . ."

Although the trial court erred in failing to so instruct the jury, such error was harmless. Appellant argues that CALJIC No. 10.61.1 was necessary to counteract the potential prejudicial effect of the last sentence of the instruction on actual consent in CALJIC No. 1.23.1, under which the jury was informed that "[t]he fact, if established, that the defendant and the alleged victim engaged in a current or previous dating relationship does not by itself constitute consent." He claims that since the jurors were

given this instruction, relating to the couple's previous *dating relationship*, they "could not possibly understand" that they were entitled to consider the couple's previous *sexual relationship*, and he argues that prejudice is shown because "CALJIC No. 1.23.1's admonition that a prior dating relationship could not constitute consent effectively vitiated any consideration whatsoever of the intimacy between appellant and Terrese[.]"

This claim misinterprets CALJIC No. 1.23.1 and underestimates the ability of the jury to evaluate the evidence in light of the given law. We have determined that an instruction on reasonable and good faith belief in consent was not warranted, and thus in this case CALJIC No. 10.61.1 pertained only to actual consent. The instruction in CALJIC No. 1.23.1, relating to actual consent, informed the jury that the fact of the parties' prior dating relationship did not "by itself constitute consent," which necessarily indicates that it could, with other evidence, in fact demonstrate consent. As the jurors were aware, from the testimony of both appellant and Terrese, their previous dating relationship included consensual sex. CALJIC No. 1.23.1 did not admonish the jury either that a prior dating relationship could not constitute consent or that the jury could not consider the fact that the couple had a prior sexual relationship. Nothing more would have been added by the giving of CALJIC No. 10.61.1, which contained additional language resulting from the enactment of a series of laws intended to limit "the admissibility of evidence of a complainant's sexual history except under narrowly defined conditions . . . ." (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 222, conc. opn. of Arabian, J.) Appellant was not prejudiced by the omission of CALJIC No. 10.61.1. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

V. CALJIC No. 2.62

The jury was instructed in accordance with CALJIC No. 2.62 as follows: "In this case defendant has testified to certain matters. [¶] If you find that a defendant failed to explain or deny any evidence against him introduced by the prosecution which he can reasonably be expected to deny or explain because of facts within his knowledge, you may take that failure into consideration as tending to indicate the truth of this evidence

and as indicating that among the inferences that may reasonably be drawn therefrom those unfavorable to the defendant are the more probable. [¶] The failure of the defendant to deny or explain evidence against him does not, by itself, warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt. [¶] If the defendant does not have the knowledge that he would need to deny or to explain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain this evidence."

Appellant contends that this instruction was not supported by the evidence, as is required by *People v. Saddler* (1979) 24 Cal.3d 671, 681. He asserts that the giving of the instruction was prejudicial and violated his constitutional rights to due process and a fair trial. The constitutional claims are waived because they were not raised below. (*People v. Williams* (1997) 16 Cal.4th 153, 250.) Moreover, appellant's contention is unavailing.

As respondent asserts, a delay in disclosing information may constitute a sufficient basis for the giving of this instruction (*People v. Redmond* (1981) 29 Cal.3d 904, 911), and appellant's failure to tell the police when he was arrested for attempted murder that Terrese hit him and that he struck her in self-defense, or that she had threatened that she could ruin his life, was such a delay warranting the instruction. As respondent also points out, a defendant's "'bizarre and implausible' explanation" warrants the giving of this instruction. (*People v. Sanchez* (1994) 24 Cal.App.4th 1012, 1029-1030.) Appellant's description of how he grabbed Terrese at the time of the charged choking incident was implausible given nurse McConnell's description of the nature of the injuries the victim sustained and her explanation of the degree of force necessary to cause such injuries, and appellant failed to explain how she could have sustained such injuries, which only he could have inflicted. The instruction was properly given. (*People v. Belmontes* (1988) 45 Cal.3d 744, 784; *People v. Ramirez* (1980) 109 Cal.App.3d 529, 543.)

Moreover, any error in the giving of CALJIC No. 2.62 would be harmless. CALJIC No. 2.62 "does not direct the jury to draw an adverse inference. It applies only if the jury finds that the defendant failed to explain or deny evidence. It contains other portions favorable to the defense (suggesting when it would be unreasonable to draw the inference; and cautioning that the failure to deny or explain evidence does not create a presumption of guilt, or by itself warrant an inference of guilt, nor relieve the prosecution of the burden of proving every essential element of the crime beyond a reasonable doubt)." (*People v. Ballard* (1991) 1 Cal.App.4th 752, 756-757.) In addition, the jury was instructed in accordance with CALJIC No. 17.31 that it was to disregard any instruction which applied to facts which it determined did not exist. (*People v. Kondor* (1988) 200 Cal.App.3d 52, 58.) It is not reasonably probable a more favorable verdict would have resulted absent the instruction. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

VI. Cumulative error

Appellant contends that the effect of the *Marsden* and instructional errors, combined, denied him due process and require reversal. Any errors were harmless, individually or collectively. Appellant was not denied a fair trial, and reversal is not warranted. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.)

VII. Section 667.61 and the three strikes law

Appellant was sentenced to 5 years for kidnapping and to a consecutive term of 15 years to life under the one strike law (§ 667.61) for rape which was committed under the circumstance that he kidnapped the victim of the rape. The terms of 5 years for kidnapping and of 15 years to life for rape under the one strike law were then doubled under the provisions of the three strikes law. Appellant contends that section 667.61, the one strike law, is an enhancement not subject to the doubling provision of the three

strikes law. This claim has been rejected by the Supreme Court in *People v. Acosta* (2002) 29 Cal.4th 105, 118.[9]

VIII. Section 667.61, subdivision (f)

Appellant contends, and respondent agrees, that under the plain language of section 667.61, subdivision (f), the 10-year sentence imposed for kidnapping pursuant to section 207 was improperly imposed. This claim is well taken.

Section 667.61, subdivision (b) provides for a term of 15 years to life when a defendant is convicted of an offense specified in subdivision (c) of that section under "one of the circumstances specified in subdivision (e)." Appellant was convicted of forcible rape in violation of section 261, subdivision (a)(2), an offense specified in subdivision (c)(1). The jury found that in the commission of rape, appellant was engaged in the crime of kidnapping in violation of section 207, a circumstance set forth in section 667.61, subdivision (e)(1).

Subdivision (f) of section 667.61 provides, in pertinent part, "If only the minimum number of circumstances specified in subdivision . . . (e) which are required for the punishment provided in subdivision . . . (b) to apply have been pled and proved, that circumstance . . . shall be used as the basis for imposing the term provided in subdivision . . . (b) rather than being used to impose the punishment authorized under any other law, unless another law provides for a greater penalty." The kidnapping circumstance was the only circumstance pled and proved under subdivision (e) of section 667.61. The punishment set forth in subdivision (b) based upon the kidnapping circumstance specified

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[9] Since the Supreme Court has addressed and rejected appellant's contention, we decline appellant's request for judicial notice of legislative history materials pertaining to section 667.61. We further decline to address appellant's argument that *People v. Jefferson* (1999) 21 Cal.4th 86, addressing a related three-strikes issue where the Supreme Court held that the life term imposed under section 186.22, subdivision (b)(4) is an alternate penalty rather than an enhancement, should be reconsidered because it elevated form over substance in light of *Apprendi v. New Jersey* (2000) 530 U.S. 466.

in subdivision (e) is greater than that for kidnapping set forth in section 207, which carries a sentence of three, five or eight years. (§ 208.) The term for kidnapping must be stricken. (*People v. Mancebo* (2002) 27 Cal.4th 735, 743-744, 754.) Since the ten-year sentence for kidnapping was the base term for the determinate sentence, the matter must be remanded to permit the trial court to select among the range of three terms for the remaining count, assault by means likely to produce great bodily injury.

IX. Section 654

Appellant also contends that the sentence for kidnapping must be stayed because it was based on the same act as the section 667.61, subdivision (b) "enhancement" and thus violates the prohibition against multiple punishment of section 654.[10] Since we have determined that the sentence for kidnapping must be stricken in accordance with the dictates of section 667.61, subdivision (f), we need not address this issue.

X. Admission of the prior conviction allegations

After the verdicts were read, defense counsel informed the trial court that appellant would admit the prior conviction allegations. The prosecutor indicated he would dismiss one of the two alleged prison priors. The trial court then asked appellant, "Sir, do you admit having suffered a conviction of the prior alleged in this case, being the strike prior, a serious or violent felony conviction for the charge of Penal Code section 459, a burglary out of Riverside County, a conviction date being January 16, 1992; do you admit the truth of that conviction?" Appellant said, "Yes." The court then asked, "Sir, do you admit you suffered a conviction in case KA006595, Penal Code section 487.1, a theft offense, grand theft offense, on April 2nd of 1992, out of Los Angeles Superior Court?" Appellant said, "Yes." The court asked, "You understand in each of

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10 Section 654 provides, in pertinent part, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

these admissions that you're waiving and giving up your right to have those matters determined by a jury trial?" Appellant said, "Yes." The court asked if counsel joined, and when defense counsel said, "Yes," the court accepted the two admissions.

Appellant contends that his admission of the prior conviction allegations was not voluntary and intelligent.

In *People v. Howard*, *supra*, 1 Cal.4th 1132, the Supreme Court "emphasize[d] that explicit admonitions and waivers are still required in this state," explaining that such admonitions and waivers "are the only realistic means of assuring that the judge leaves a record adequate for review." (*Id*. at pp. 1178-1179.) In *Howard*, the trial court advised the defendant that he had the right to jury trial on the truth of the prior conviction allegations, and told him he had "'the right to force the District Attorney to prove this and to bring in evidence and witnesses[.] [¶] . . . [¶] And be confronted by them[.]'" The defendant waived his rights to jury trial and confrontation. The Supreme Court looked to the totality of the circumstances to determine whether the defendant's admission of a prior conviction was voluntary and intelligent. The Supreme Court concluded that although the defendant had not been advised of the privilege against self-incrimination, his admission of his prior conviction was voluntary and intelligent, because the trial court had specifically informed him of his right to force the prosecutor to prove the prior conviction in a trial, where he would have the rights to a jury and to confront adverse witnesses; he was represented by counsel and was preparing for trial on the charges; and there was a strong factual basis for the plea, which the prosecution subsequently proved at the penalty phase. (*Id*. at p. 1180.)

However, appellant was not advised of and did not waive either his right of confrontation or his privilege against self-incrimination, and, unlike the case in *Howard*, there was no explanation of the prosecutor's burden to prove the prior convictions in a trial. In *People v. Johnson* (1993) 15 Cal.App.4th 169, 177-178, as here, the trial court did not advise the defendant or obtain waivers of the right to confrontation or the privilege against self-incrimination; in addition, it did not obtain a waiver of the right to

trial by jury. The reviewing court concluded that although it had "no doubt that [the defendant] was in fact aware of his right to a jury trial, his right to confront witnesses, and his right to remain silent, all of which he had just exercised in trial," it was impossible to determine from the silent record whether he was not only "aware of these rights, but was also prepared to waive them as a condition to admitting his prior offenses." (*Id*. at p. 178.) The court reversed the findings on the prior conviction allegations. In *People v. Torres* (1996) 43 Cal.App.4th 1073, as here, the defendant waived his right to jury trial but was not advised of, and did not waive his right to confrontation or his privilege against self-incrimination. Citing *People v. Johnson*, the court in *Torres* reversed the findings on the prior conviction allegations. (*People v. Torres*, *supra*, at pp. 1080-1083; accord, *People v. Howard* (1994) 25 Cal.App.4th 1660, 1665.) We conclude that appellant's admissions similarly were not voluntary and intelligent and must be reversed.[11]

XI. Cruel and unusual punishment

Finally, appellant contends that his life sentence constituted cruel and unusual punishment under the circumstances of this case. We have determined that the sentence for kidnapping in violation of section 207 cannot stand and the matter will be remanded for resentencing as a result, as well as for a new trial limited to the issue of the prior conviction allegations. We nevertheless address his contention, which targets the 30-year-to-life sentence imposed for rape under the one strike and three strikes laws after he rejected a pretrial offer of a seven-year term. Appellant argues that his sentence was a punishment for his choice to go to trial and is disproportionate to the crime. These claims are without merit.

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11 The issue of whether the trial court reversibly erred in failing to expressly advise the defendant of his constitutional rights and to obtain a waiver of those rights before accepting his admission to a prior conviction allegation is before the Supreme Court in *People v. Mosby* (2002) 95 Cal.App.4th 967, review granted May 1, 2002, S104862.

A trial court may not impose a more severe sentence because a defendant has elected to go to trial. (*In re Lewallen* (1979) 23 Cal.3d 274, 281.) However, "[t]he mere fact . . . that following trial defendant received a more severe sentence than he was offered during plea negotiations does not in itself support the inference that he was penalized for exercising his constitutional rights." (*People v. Szeto* (1981) 29 Cal.3d 20, 35.) Appellant must demonstrate that the higher sentence was imposed as punishment for the exercise of his right to trial. (*People v. Angus* (1980) 114 Cal.App.3d 973, 989-990.)

When appellant rejected the first plea offer based on the assault count, the trial court advised him of the merits of that offer, in view of the offenses which had not then been charged and the possible sentence of life plus 30 years were he to be convicted of those charges. Appellant was also advised, at the time he refused the seven-year plea offer based on the current information, that he faced a life term if convicted. The record fully supports the trial court's sentence choices, apart from the imposition of the term for kidnapping. (*People v. Huston* (1989) 210 Cal.App.3d 192, 223.) There is nothing in the record to evidence a retaliatory motive for appellant's exercise of his right to go to trial. (*People v. Aragon* (1992) 11 Cal.App.4th 749, 759.)

The jury considered all the evidence presented at trial, found appellant not guilty of assault with intent to commit rape or oral copulation or of forcible oral copulation, and found him guilty of the remaining charges. The evidence amply supports his guilt of those offenses and the finding under the one-strike law. This case is unlike *People v. Dillon* (1983) 34 Cal.3d 441, on which appellant relies, in that appellant is not an immature 17-year-old and his crime was not the panicked response to a "'suddenly developing situation'" (*People v. Estrada* (1997) 57 Cal.App.4th 1270, 1279-1280); moreover, it does not appear that either the jury or the trial court here expressed any reluctance to impose the sentence required by law.

The Legislature has broad discretion in determining the appropriate punishment for crimes. (*People v. Dillon*, *supra*, 34 Cal.3d at pp. 477-478.) Appellant's current offenses were crimes of violence, and his prior record is comprised of a continuing

history of offenses commencing in 1983 and continuing until 1998. The probation report indicates that he was a fugitive from justice, having failed to appear for a hearing in New Jersey in 1998. Considering the nature of the offense and the nature of the offender, we cannot find that his sentence was so disproportionate to his crimes that it shocks the conscience or offends fundamental notions of human dignity. (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 199-201; *People v. Estrada*, *supra*, 57 Cal.App.4th at pp. 1277-1280.)

DISPOSITION

The 10-year term imposed for kidnapping in count 4 is stricken, the findings entered upon appellant's admissions of the prior conviction allegations pursuant to the three strikes law and section 667.5, subdivision (b) are reversed, and the sentence is vacated. The matter is remanded for proceedings limited to the issue of the truth of the prior convictions alleged in the information and for resentencing, including the selection of a new base term for assault by means likely to produce great bodily injury. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
DOI TODD

We concur:

_____, P.J.
BOREN

_____, J.
NOTT