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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **CLIFFORD MERLE CUTRELL,** **Defendant and Appellant.**	**A127328** **(Lake County** **Super. Ct. No. CR916005)**

Guadalupe R. applied for a job as a motel housekeeper. When she showed up for her first day of work, the man who had told her she was hired took her into a basement, closed the door, and made her touch his penis. Appellant Clifford Merle Cutrell, a registered sex offender who worked at the motel, was identified by Guadalupe as the man who assaulted her. He was tried before a jury and convicted of sexual battery, misdemeanor false imprisonment and failure to update his sex offender registration within five days of his birthday. (Pen. Code, §§ 243.4, subd. (d)(1), 236, 290, subd. (a)(1)(D).) Allegations that he had suffered a prior conviction under the Three Strikes law and had served a prior prison term were found true by the court in a bifurcated proceeding. (Pen. Code, §§ 1170.12, 667.5, subd. (b).) We reject appellant's various claims of trial and sentencing error and affirm the judgment sentencing him to an aggregate prison term of ten years four months.

FACTS

Appellant, who had prior convictions for felony sexual offenses, began working at the Lamplighter Motel in Clearlake as a laborer. The motel had been closed for several

years and renovations were underway. Lynn Rossman, who owned the motel with her husband, allowed appellant to move into one of the rooms with his wife and baby because they had no place to live. Appellant worked with John, another employee of Rossman's, to perform the renovations to the motel. A man named Chris Jacobs also worked there, as did Danny Austin and a woman named Stacy.[1] Rossman spent most of her time away from the Lamplighter after May 19, 2007, when her husband had a heart attack.

Guadalupe R. and her family lived in Clearlake within walking distance of the Lamplighter. In June 2007, she went there to apply for a job as a housekeeper. Guadalupe took her eight-year-old son Eric with her to translate, as she spoke Spanish and could not communicate well in English. Appellant and another man were working at the Lamplighter when Guadalupe arrived and appellant, the taller of the two, gave her a job application and a piece of paper with a telephone number. Guadalupe took the application home, filled it out, and later returned it to appellant.

Sometime after she returned the employment application, Guadalupe received a telephone call telling her it needed to be redone. She returned to the Lamplighter with Eric, filled out another application, and discussed her housekeeping experience with appellant. Guadalupe saw appellant again when she returned to the motel to meet the owner. She was called in to work on another day, but was sent home and did not work that day.

Early in the morning on July 5, 2007, Guadalupe received a telephone call from appellant telling her to come in to work. She arrived at about 7:45 in the morning as instructed. Appellant was waiting for her and took her into a basement filled with furniture. He gestured to her that they were going to move some furniture, but then he shut the door and pushed her onto a chair. He stood in front of her, unfastened the shorts he was wearing, grabbed her hand and put it on his erect penis. Guadalupe told him no, and kept telling him that she needed to go to the bathroom. He pulled out some

[1] The last names of John and Stacy do not appear in the record, so we refer to them by first name only. We will also refer to the victim and her family by first name only to protect their privacy.

handcuffs, but she hid her hands behind her back and kept telling him no. Appellant suddenly said, "Okay," and they left the basement through a different door.

After they left the basement, appellant apologized and asked if they were friends. Guadalupe said okay. Appellant asked her if she still wanted to work and she agreed, being too afraid to leave. He took her inside the motel office and she began painting one of the walls as he requested. While Guadalupe was painting, the man who had been with appellant when she first applied for work stopped by and spoke to appellant in English; she did not understand what they said to each other. Appellant briefly left the office and returned with a baby he said was his. A young woman stopped by to pick up a job application and this gave Guadalupe the courage to leave. She told appellant she had not come there to paint, and understood him to say he would call when there was work available for her.

Guadalupe walked home and called her husband Jose R. to tell him what happened. He drove home immediately from his job in Santa Rosa and found Guadalupe crying and shaking. Guadalupe told him she had gone to the Lamplighter to work and that a man there had taken her into a room with lots of furniture and tried to abuse her. She said the man had pulled off his pants and gotten close to her and tried to have oral sex. Jose took Guadalupe to the Clearlake Police Department station that same morning to report what had happened. She had small paint marks on her body and face when she came into the station.

Guadalupe was interviewed by Detective Towle, who was assisted by Officer Lopez, a Spanish-speaking police officer. Guadalupe related the events described above. She described her assailant as a White male between 35 and 40 years old, about six feet tall, with a medium build, short hair, blue eyes and tattoos, including tattoos of letters on the calf of each leg. Appellant was at that time 37 years old, six feet four inches tall, 230 pounds with blue eyes, tattoos on his neck and arms, and a tattoo of a letter on the

back of each leg.[2] Chris Jacobs, who also worked at the Lamplighter, was not as tall as appellant.

Detective Towle knew that appellant was a registered sex offender who worked at the Lamplighter. He obtained a photograph of appellant and composed a six-person photographic lineup in which appellant's picture was placed in the number two position. Towle gave the photographic lineup to Officer Lopez, who showed it to Guadalupe. Guadalupe chose appellant's picture as well as the subject in photograph number five. She believed both photographs resembled her assailant, but that number two (appellant) had a "fuller face" that looked like him.

Guadalupe was interviewed several times by representatives of the District Attorney's office. During a March 10, 2008 interview, she described her assailant as a tall, bald White male with goatee-type facial hair and many tattoos, two of which were letters on the back of each calf. Guadalupe was shown a photographic lineup that included a picture of Chris Jacobs, but could not identify anyone in that lineup. She was also shown a photographic lineup with a picture of John, the other motel employee, but she could not identify him or anyone else in the lineup as her assailant.

Guadalupe drew diagrams of the basement and office at the Lamplighter. Deputy Zepeda of the Lake County Sheriff's Department, who acted as a translator at the March 10 interview, later visited the motel office and basement and found the drawings to be "pretty accurate."

Investigator Morshed of the district attorney's office interviewed Guadalupe's son Eric at his school on April 2, 2008. Eric described the man at the motel as being very tall with a lot of tattoos on his neck, collarbone, shoulders and arms. He also said the man had short brown or black hair and blue eyes. Morshed mistakenly showed Eric a photographic lineup that did not contain appellant's picture, and Eric pointed to two men

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[2] Police asked Guadalupe to draw pictures of the tattoos on her assailant's legs, and she drew an "F" and an "M." People's Exhibit 23, a photograph taken of the back of appellant's legs, shows that he has a tattoo of an "S" on his left calf and an "R" on his right calf, both of which are written in a stylized script.

who "look[ed] almost like" the man at the motel. When Eric was shown a six-person lineup that included appellant's picture, he identified appellant and said that he and his family had seen him on the street several times.

Guadalupe saw appellant around town on three occasions between the time of her assault and the time of her trial. Her husband Jose saw him "more than a hundred" times. Guadalupe recalled going to the Lamplighter on the day after the attack (July 6, 2007) at Jose's insistence; she did not remember seeing appellant on the premises that day, although Jose remembered that they saw appellant when they drove by the motel early in the morning on July 6 and that they called the police but no one came. At some point, possibly that same day, Jose spoke to Rossman, the owner of the Lamplighter, in an attempt to get more information about appellant.[3]

The case proceeded to trial, at which appellant's primary defense was mistaken identity. The defense called Dr. Robert Shomer, an experimental psychologist, who testified at length about factors affecting eyewitness identification and its unreliability.

In addition to the evidence described above, Tricia Terrell testified that she was appellant's wife at the time of the incident and that they were then living at the Lamplighter with their infant daughter. They awoke at about 8:00 a.m. on July 5, 2007 and, along with other employees, did some work around the motel. Terrell had a doctor's appointment at 2:30 in the afternoon, and they left the following day (July 6, 2007) to go

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[3] The evidence concerning Jose and Guadalupe's contacts with Rossman were not entirely consistent. Rossman described a conversation in which Jose asked her appellant's last name and demanded to know why appellant would have called Guadalupe to come into work when there was no work. Jose recalled asking "an old lady" about "Cliff," a name he knew because Guadalupe had told him that Cliff was the man in charge, but he denied that he had complained about Guadalupe being called in for work. Rossman also believed that sometime before her husband's heart attack, Guadalupe had worked for her for a few days, although both Guadalupe and Jose testified that she had not worked at the Lamplighter before the events leading to this case. Rossman acknowledged that Hispanic women who did not speak much English frequently came to the motel asking for work and that quite a few Hispanic women had worked for the motel.

camping. Appellant was proud of their baby and liked to show her off to other people. She thought Chris Jacobs was "creepy" and would not have let him hold her baby. Terrell believed appellant did not have a key to the motel basement, but Lynn Rossman testified that appellant did have a key to the basement and that she, John and appellant were the only ones who did.

Although appellant was legally required to register as a sex offender, he had not updated his registration within five working days of his last birthday as required by statute. (Pen. Code, §290.)

DISCUSSION

I. Evidence of Prior Sexual Offenses

Appellant argues that the judgment must be reversed because the court admitted evidence of prior sexual offenses under Evidence Code section 1108[4] and gave a related jury instruction that potentially lowered the prosecution's burden of proof. Appellant also challenges the evidence of the prior offenses as more prejudicial than probative under section 352. We disagree.

A. *Background*

In 1999, appellant was convicted of separate acts of assault with intent to commit rape and sexual battery. (Pen. Code, §§ 220, 243.4.) Over defense objection, the court ruled that these prior sexual offenses were admissible under section 1108 and were not unduly prejudicial under section 352. The court acknowledged that presenting inflammatory details of the prior offenses might violate section 352, but it stated that it would limit the scope of that evidence to the convictions themselves. The court observed that the evidence could be presented through redacted court documents or a stipulation by the parties, and suggested that a stipulation might be less prejudicial because jurors tend to wonder about redactions.

In light of this ruling and the court's comments, the parties drafted the following stipulation that was read to the jury: "The parties hereby stipulate to the following:

[4] Further statutory references are to the Evidence Code unless otherwise indicated.

[¶] 1. On July 28th, 1999, Defendant CLIFFORD MERLE CUTRELL was convicted of a violation of Penal Code section 220(a) in that on April 30, 1999, he did willfully and unlawfully assault Mary Doe with the intent to commit rape. [¶] 2. On July 28, 1999, Defendant CLIFFORD MERLE CUTRELL was convicted of a violation of Penal Code section 243.4 in that on October 6, 1997, he did willfully and unlawfully touch an intimate part of Jane Doe against the will of that person and for the purpose of sexual arousal, sexual gratification, and sexual abuse." No evidence was presented about the details of the prior offenses.

B. *Section 1108 and Related Jury Instruction*

Evidence of prior criminal conduct is generally inadmissible to show that the defendant has a propensity or disposition to commit those acts. (§ 1101, subd. (a).) The Legislature has created exceptions to the general rule where the uncharged acts involve sexual offenses. Under section 1108, subdivision (a), "[E]vidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

Appellant argues that section 1108 violates the due process clause of the United States Constitution by allowing the prosecution introduce evidence of criminal propensity. Our Supreme Court rejected this claim in *People v. Falsetta* (1999) 21 Cal.4th 903, 912-922 (*Falsetta*), in which it concluded that section 1108 was constitutionally valid because it "preserves trial court discretion to exclude the evidence if its prejudicial effect outweighs its probative value" under section 352. (*Falsetta,* at p. 907.) The decision in *Falsetta* is binding upon this court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455).

Turning to the jury instructions given, appellant complains that CALCRIM No. 1191 improperly allowed a conviction based on conduct that had only been proven by a preponderance of the evidence: "The People presented evidence that the defendant committed the crimes of Assault to commit a sex offense and Sexual Battery that were not charged in this case. These crimes are defined for you in these instructions. [¶] You may consider this evidence only if the People have proved by a preponderance of the

evidence that the defendant in fact committed the uncharged offenses. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit Assault with intent to commit oral copulation and Sexual Battery, as charged here. If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of Assault with intent to commit oral copulation and Sexual Battery.[5] The People must still prove each charge beyond a reasonable doubt."

The substance of this instruction has been upheld by our Supreme Court against the challenge appellant now raises. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1016 (*Reliford*) [approving former version of CALJIC NO. 2.50.01]; *People v. Schnabel* (2007) 150 Cal.App.4th 83, 87 [extending *Reliford* analysis to CALCRIM No. 1191]; see also *People v. Cromp* (2007) 153 Cal.App.4th 476, 480.) Contrary to appellant's suggestion, the court in *Reliford* specifically considered and rejected the claim that the instruction allows the jury to convict the defendant of the current offense based on a lowered standard of proof. (*Reliford*, at p. 1016 ["We do not find it reasonably likely a jury could interpret the instructions to authorize conviction of the charged offenses based on a lowered standard of proof. Nothing in the instructions authorized the jury to use the preponderance-of-the-evidence standard for anything other than the preliminary determination whether defendant committed a prior sexual offense. . . ."])

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[5] In addition to the sexual battery count of which he was convicted (Pen. Code, § 243.4), appellant was charged with and acquitted of assault with intent to commit oral copulation (Pen. Code., § 220).

C. *Section 352*

Appellant alternatively claims the evidence of his prior offenses should have been excluded under section 352, which allows the court to exclude in its discretion evidence whose probative value is "substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." We review the court's ruling on a section 352 objection for abuse of discretion. (*People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1116 (*Nguyen*).)

None of the factors that are "particularly significant" to assessing this challenge support appellant's argument that the trial court abused its discretion. (See *Nguyen, supra*, 184 Cal.App.4th at p. 1117.) The probative value of the prior convictions was high, given that they involved the same offenses as the charged crimes. (*Ibid*.) The evidence of the prior offenses was not unduly inflammatory, consisting of a stipulation that was limited to the dates, Penal Code section and general descriptions of the prior convictions. (*Nguyen,* at p. 1117.) The prior offenses were not unduly remote, having occurred within 10 years of the charged crimes, during which time the defendant had served a seven-year prison term and had been returned to prison on a parole violation. (*Ibid.*) The lack of any inflammatory details about the conduct underlying the prior convictions made it unlikely the jury would be tempted to punish appellant for past wrongs. (*Ibid*.) Finally, the evidence presented did not involve an undue consumption of time. (*Ibid*.)

Appellant complains that the "court-forced" stipulation regarding the prior offenses could have led the jury to believe those crimes involved behavior identical to those he was currently accuse of committing, when in fact the nature of the those crimes was not a part of the record. The court did not require defense counsel to stipulate to propensity evidence or to omit all factual details from the stipulation. It merely suggested that a stipulation likely would be less prejudicial than live witnesses or redacted versions of court documents from the underlying cases. Nothing prevented defense counsel from presenting additional evidence about the nature of the prior offenses if he believed such a strategy would have been more beneficial to his client.

II. Suggestive Pretrial Lineup

Appellant argues that the court violated his constitutional right to due process when it allowed Guadalupe to identify him in court as her attacker. We are not persuaded.

The defense moved in limine to exclude any in-court identification by Guadalupe, asking for a hearing to establish her ability to identify him when he was not sitting in the "obvious" seat in the courtroom. A hearing was held outside the jury's presence, at which Guadalupe described the man who assaulted her as being tall, strong, and heavyset, with white skin, blue eyes and tattoos. She testified that she had seen him around town three other times since the attack: once on her way from church, once on her way home from picking up her children and once when he was standing by the door of a house. Guadalupe remembered that the police had showed her several pictures and that she had circled two of them, but she had then clarified which one she believed was her assailant. She believed she could recognize him and volunteered she had been told he would be sitting in the front of the court. She then explained that the prosecutor had not told her where appellant would be sitting, but had just told her that "he was going to be like a normal person." Asked if she knew where appellant would be sitting she explained that she had not been told he would be sitting in the front. She was very nervous and had just been guessing.

Based on this testimony, defense counsel asked that Guadalupe be precluded from making an in-court identification. He noted that she had circled two pictures in the photographic lineup and had seen appellant since the assault, potentially tainting her identification. The court denied the defense motion, indicating that the two individuals Guadalupe had picked in the photographic lineup looked similar to one another, that her later sightings of appellant had not been orchestrated by the police in an attempt to taint her testimony, and that there was no real evidence the person she saw on those occasions actually was appellant. The court credited Guadalupe's testimony that she had not been told appellant would be sitting in the front.

A defendant is not deprived of due process unless the challenged identification procedure is " 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' " (*People v. Cook* (2007) 40 Cal.4th 1334, 1355.) We independently review the trial court's ruling that a procedure was not unduly suggestive, giving deference to the trial court's findings of historical fact. (*People v. Kennedy* (2005) 36 Cal.4th 595, 609, disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

Appellant argues that the photographic lineup was unduly suggestive because his photograph was the only one with a blue background. He did not argue this point below and has forfeited the claim on appeal. (*In re Michael L.* (1985) 39 Cal.3d 81, 87-88.) In a supplemental brief, appellant alternatively contends his trial counsel was ineffective in failing to raise the issue in the trial court. We are not persuaded.

To prevail on a claim of ineffective assistance, a defendant must demonstrate both deficient performance under an objective standard of reasonableness and prejudice, i.e., a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington* (1984) 466 U.S. 668, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.) The failure to object to admissible evidence does not constitute ineffective assistance of counsel. (*People v. King* (2010) 183 Cal.App.4th 1281, 1308.)

Having reviewed the photographic lineup that was shown to Guadalupe, we conclude it was not unduly suggestive, and that the trial court would not have suppressed her identification of appellant on this ground. All of the photographs were of Caucasian men with goatee-type facial hair. Although appellant's is the only one with a blue background, apparently because it came from the DMV, minor differences in the background or size of a photograph do not make a lineup suggestive. (See *People v. Johnson* (1992) 3 Cal.4th 1183, 1217.)

Because the blue background of appellant's photograph did not render the lineup unduly suggestive, Guadalupe's in-court identification was not tainted and was not subject to attack. (*People v. Ochoa* (1998) 19 Cal.4th 353, 412.) A motion to exclude

the identification on this ground would have been unsuccessful, and it follows that appellant cannot demonstrate deficient performance by his counsel. (*Strickland*, *supra*, 466 U.S. at pp. 693-694.) Counsel is not required to make frivolous motions or to take patently futile actions in order to defeat a later claim of ineffective assistance. (*People v. Frye* (1998) 18 Cal.4th 894, 985, disapproved on other ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Appellant also complains that Guadalupe also selected a second photograph of a man in position number 5 whose ears were much different than his. The subject in photograph number 5 does have more prominent ears, but otherwise resembles appellant. Defense counsel was free to argue that Guadalupe's selection of the other photograph rendered her identification less reliable, but it did not make the lineup itself unduly suggestive and did not necessitate the suppression of her in-court identification.

We also reject appellant's contention he was deprived of due process because Guadalupe "was told that the man who attacked her would be in the courtroom, sitting in the front." This is contrary to the factual finding made by the trial court, to which we defer. (*Kennedy*, *supra*, 36 Cal.4th at p. 609.)

"Surely, we cannot say that under all the circumstances of this case there is 'a very substantial likelihood of irreparable misidentification.' [Citation.] Short of that point, such evidence is for the jury to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." (*Manson v. Brathwaite* (1977) 432 U.S. 98, 116.) The court did not err in admitting the identification evidence and allowing the jury to weigh its reliability.

III. CALCRIM No. 315 and Eyewitness Certainty

The trial court gave CALCRIM No. 315, which described the factors affecting the accuracy of eyewitness identification. One such factor was, "How certain was the witness when he or she made an identification?" Appellant argues that this aspect of the instruction was erroneous because research and empirical studies in the area of

eyewitness identification have shown that greater certainty does not equate to greater accuracy. We disagree.

As appellant notes, a witness's degree of certainty was identified in *Neil v. Biggers* (1972) 409 U.S. 188, 199 (*Neil*) as one of the factors affecting the accuracy of an eyewitness identification. Our Supreme Court has expressly approved a version of CALJIC No. 2.92 advising the jury to consider the *Neil* factors, including the degree of certainty, when assessing whether an eyewitness identification in a particular case was reliable. (*People v. Wright* (1988) 45 Cal.3d 1126, 1141; see also *People v. Sullivan* (2007) 151 Cal.App.4th 524, 561-562; *People v. Gaglione* (1994) 26 Cal.App.4th 1291, 1302-1303 [rejecting arguments that "certainty" factor should not be included in jury instruction], disapproved on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, 452.)

Appellant observes that in the years since *Neil*, research has shown that an eyewitness's certainty does not make an identification more likely to be accurate. He cites out-of-state authorities that have disapproved jury instructions equating eyewitness certainty with the reliability of an identification. (E.g., *Brodes v. State* (Ga. 2005) 614 S.E.2d 766, 770-771.) The effect of eyewitness certainty is a legitimate topic of argument to the trier of fact, but this does not mean it has no role to play in the jury's assessment of an identification. Absent clear direction from the California Supreme Court, we are not prepared to say the certainty factor should be deleted from CALCRIM No. 315 as a matter of course.

Even if erroneous, the inclusion of the certainty factor in CALCRIM No. 315 would not require reversal. For one thing, it is not even clear the jury would have conceded that Guadalupe was "certain" in her identification. She identified appellant in court as her attacker without expressing any doubt, but the evidence also showed that she had selected the pictures of two different individuals when police showed her the initial photographic lineup, suggesting a degree of *un*certainty.

Additionally, the only expert witness to testify about eyewitness identification was Dr. Shomer, who explained, "There is no relationship between [eyewitness] confidence

and accuracy. And that's the most researched factor of all. No relationship between how confident the witness is and how accurate they are." In the face of this testimony, which was not contradicted by a contrary expert opinion, it is not reasonably probable the jurors would have given significant weight to any "certainty" they perceived in Guadalupe's in-court identification. (See *People v. Ward* (2005) 36 Cal.4th 186, 213-214 (*Ward*).)

We also note that although no other person witnessed the attack, the circumstantial evidence of appellant's guilt was strong. As defense counsel acknowledged in his closing argument, Guadalupe had no motive to fabricate what happened to her, and the main question was the identity of her assailant. Appellant was working and living at the Lamplighter and according to the motel owner, had a key to the basement. His general appearance and distinctive tattoos matched the description Guadalupe gave of her assailant before seeing any photographs, and, having reviewed the photographic lineups that contained pictures of John and Chris Jacobs, we can say that appellant does not resemble these other male Lamplighter employees.

Guadalupe's testimony that the assailant showed her his baby after releasing her from the basement was particularly incriminating, given that appellant's wife and baby lived with him in one of the motel rooms and the evidence does not suggest that any other men on the premises were likely to have access to a baby. Appellant's wife testified specifically that she would not have allowed Chris Jacobs to hold her baby. Finally, appellant has a history of committing crimes similar to the ones in this case. It is not reasonably probable the jury would have returned a more favorable verdict if the "certainty" factor had been deleted from CALCRIM No. 315. (*Ward, supra*, 36 Cal.4th at p. 214.)

IV. Jury Instruction on Alibi

The trial court rejected defense counsel's request for an instruction on the concept of alibi. Appellant argues that the court should have given CALCRIM No. 3400, which would have advised the jury: "The People must prove that the defendant committed [the crimes charged]. The defendant contends he did not commit these crimes and that he was somewhere else when the crimes were committed. The People must prove that the

defendant was present and committed the crimes with which he is charged. The defendant does not need to prove he was elsewhere at the time of the crimes. [¶] If you have a reasonable doubt about whether the defendant was present when the crimes were committed, you must find him not guilty."

An alibi instruction is a pinpoint instruction that relates particular facts to a legal issue in a case. (See *People v. Saille* (1991) 54 Cal.3d 1103, 1119.) It must be given at the request of the defense only when it is supported by substantial evidence. (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1049-1050.) Substantial evidence is evidence sufficient to deserve consideration by the jury, that is, evidence that a reasonable jury could find persuasive. (*People v. Benavides* (2005) 35 Cal.4th 69, 102.)

When seeking the alibi instruction below, defense counsel acknowledged there was no evidence appellant was away from the Lamplighter Motel when the crime was committed on the morning of July 5, 2007. Appellant's so-called "alibi" defense was that he was doing something else on the premises of the Lamplighter during the morning when Guadalupe was accosted in the basement. Appellant argues that the testimony of his wife, Tricia Terrell, and his adult daughter, Rebecca Ruiz, supported the theory that he was elsewhere on the Lamplighter premises when Guadalupe was assaulted in the basement. We do not agree.

Terrell testified to the following: She and appellant had awakened at about 8:00 a.m. on the morning of July 5, 2007, after Chris Jacobs and Stacy arrived for work. Appellant left the room at about 8:00 a.m. and later returned. Terrell and Stacy stained some plywood for about half and hour, and appellant and another worker, Danny Austin, painted the office. Terrell had a doctor's appointment between 2:30 and 3:30 p.m. and the following day (July 6), she and appellant left to go camping. She did not see any Hispanic females on the motel premises on July 5.

Ruiz testified that she and her husband spent the night in a room at the Lamplighter on July 4, and that she saw appellant early the next morning, on July 5. She recalled that appellant took her husband around the motel that morning, showing him how to do various tasks to help out. Ruiz, like Terrell, did not recall seeing any Hispanic

women on the premises, nor did she remember seeing anyone painting the motel office. Ruiz thought that appellant might have left for the family camping trip on July 5, rather than the following day, but she placed appellant's departure later in the day.

Nothing in the testimony of Terrell or Ruiz tends to show that appellant was in any particular place on the Lamplighter premises when Guadalupe was assaulted. Taking a slightly different approach, appellant argues that because the evidence showed so many other people were present at the Lamplighter on the morning of July 5, the jury could infer that "a reasonable person would not risk discovery of such a blatant and severely compromising sexual act. . . ." The defense was free to argue this inference, but it was not evidence of alibi.

Even if we assume the court should have given CALCRIM No. 3400, the omission was harmless. CALCRIM No. 3400 would have informed the jury that the prosecution had the burden of proving beyond a reasonable doubt that appellant committed the charged crimes, and that appellant did not have the burden of proving the claim that he was somewhere else when the crime was committed. But the jury was fully instructed on the burden of proof beyond a reasonable doubt (CALCRIM No. 220) and the proper consideration of circumstantial evidence, including the principle that "If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence." (CALCRIM No. 224). It is not reasonably likely the jury would have believed that appellant had the burden of proving he was not at the scene of the assault, as he now suggests. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 72 & fn. 4; *People v. Kelly* (1992) 1 Cal.4th 495, 525.)

V. Sentencing Issues

Appellant's prison sentence included a four-year upper term on the sexual battery count, doubled to eight years under the Three Strikes law. Appellant argues that the case should be remanded for resentencing because the trial court reviewed a copy of a "Static-99" report that was not provided to defense counsel before the sentencing hearing, and

that report might have influenced the court's decision to impose the upper term. We conclude that remand is not required.

When a defendant is convicted of a crime for which sex offender registration is mandatory, or when the probation report recommends that registration be ordered in the court's discretion, Penal Code section 1203, subdivision (b)(2)(C) provides that "the probation officer's report shall include the results of the State-Authorized Risk Assessment Tool for Sex Offenders (SARATSO) administered pursuant to Sections 290.04 to 290.06, inclusive, if applicable." The SARATSO for male sex offenders is the Static-99, which measures the statistical risk a defendant will commit further sexual offenses based on characteristics of his personal history and past offenses as they compare with those of known criminal sexual recidivists. (Pen. Code, § 290.04, subd. (b)(1); *People v. Williams* (2003) 31 Cal.4th 757, 762, fn. 3.)

A Static-99 report was prepared in this case and provided to the sentencing court. The court did not provide copies of the report to either the prosecution or the defense, believing it to be confidential. Defense counsel objected to the report on the grounds that it was unreliable and that its unavailability to counsel deprived appellant of the right to confront the witnesses against him. The court stated that it was required to review the report, but "I'm not making a determination as to what an appropriate sentence would be as a result of the SARATSO evaluation, but just to consider the information as required by the law, at least I can't do that without looking at it. How much weight I give it may be very, very little, but I have looked at it and examined it."

Appellate counsel filed a motion to augment the record with a sealed copy of the Static-99 motion. This court granted the request and provided counsel with a copy of the report. Appellant now argues that the case should be remanded for a resentencing hearing at which counsel has notice of the report's contents. He also suggests he is entitled to a hearing under *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*) to determine the reliability of the Static-99 as scientific evidence.

We conclude the court's failure to provide defense counsel with a copy of the Static-99 report was harmless beyond a reasonable doubt. The court stated that while it

was required to review the report, it was not considering it for the purpose of determining the length of the sentence. Appellant was statutorily ineligible for probation due to his prior conviction under the Three Strikes law (Pen. Code, § 1170.12, subd. (a)(2)), so the report could not have affected the court's decision to impose a prison sentence in lieu of probation. Appellant has now had an opportunity to review the report, but offers no specific criticism of its contents and does not explain how its prior receipt would have enabled his counsel to effectively advocate for a more favorable disposition. Given the lack of any connection between the Static-99 and the sentence imposed, we need not consider appellant's claim that he was entitled to a hearing under *Kelly, supra*, 17 Cal.3d 24, to determine the report's admissibility.

Appellant also seeks to preserve for federal review a claim under *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*), arguing that the trial court relied on facts that were not proved beyond a reasonable doubt or found true by the jury when it selected the upper term. He acknowledges that the sentencing in this case occurred after the March 30, 2007 amendment to Penal Code section 1170, which remedied the constitutional defect identified in *Cunningham* by giving trial courts the discretion to impose a lower, middle or upper term sentence without relying on specific ultimate facts. (Stats. 2007, ch. 3, § 2, effective Mar. 30, 2007; see *People v. Sandoval* (2007) 41 Cal.4th 825, 847-848; *People v. Jones* (2009) 178 Cal.App.4th 853, 866.) We reject his *Cunningham* claim under these authorities.

DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P. J.

BRUINIERS, J.