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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND ULLOA, Defendant and Appellant.	B201072 (Los Angeles County Super. Ct. No. NA068344)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard R. Romero, Judge. Affirmed in part with modifications, reversed in part, and remanded.

Mark D. Lenenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey and Beverly K. Falk, Deputy Attorneys General, for Plaintiff and Respondent.

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*Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, the first three paragraphs of this opinion, part IV of the Discussion, and the Disposition are certified for publication in the Official Reports. The remainder of this opinion is not to be published.

Raymond Ulloa appeals from a judgment of conviction of one count of kidnapping (Pen. Code, § 207, subd. (a)),[1] two counts of kidnapping to commit robbery (§ 209, subd. (b)(1)), one count of kidnapping to commit rape (§ 209, subd. (b)(1)), one count of kidnapping for carjacking (§ 209.5, subd. (a)), one count of first degree robbery (§ 211), three counts of second degree robbery (§ 211), one count of assault with a deadly weapon (§ 245, subd. (a)(1)), three counts of making criminal threats (§ 422), three counts of dissuading a witness by force or threat (§ 136.1, subd. (c)(1)), five counts of forcible oral copulation (§ 288a, subd. (c)(2)), and three counts of forcible rape (§ 261, subd. (a)(2)).

Appellant argues that the trial court committed reversible error by admitting irrelevant, unfairly prejudicial evidence, and that the prosecutor engaged in prejudicial misconduct in her closing argument. He also claims sentencing error.

In the published portion of this opinion, we hold that section 1192.7, subdivision (c)(28), which appears within the definition of "serious felony," does not include a misdemeanor punishable as a felony pursuant to section 186.22, subdivision (d). For that reason, we conclude that the trial court's finding that appellant's prior conviction was a serious felony is not supported by substantial evidence. In the unpublished portion of this opinion, we conclude that the sentence on count 3 must be stayed, pursuant to section 654, and that errors on the abstract of judgment must be corrected. Accordingly, the sentencing portion of the judgment is reversed and the matter remanded for resentencing. In all other respects, we affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Appellant's convictions arise out of two separate incidents, which occurred on December 1, 2005, and December 11, 2005, respectively.

On December 1, 2005, at about 5:30 p.m., Christopher Caserma was sitting in his Ford Explorer in Joan Milke Flores Park in San Pedro. Caserma's cousin, Michael McConnell, and friend, Brian Sousa, also were in the vehicle. The men were sitting in the parked vehicle in order to smoke marijuana. Caserma, who was in the driver's seat

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

with the window open, noticed appellant and another man sitting in a gray Honda, staring at them. Appellant approached Caserma's side of the Explorer. Caserma noticed he had a gun tucked into his pants. Appellant ordered Caserma out of the car, held a broken seat lever to his throat, and told him to open the hatchback door of the Explorer. Appellant also demanded that all three occupants of the vehicle hand over their wallets.

After finding a bank card in Sousa's wallet, appellant struck Sousa in the face and forced him out of Caserma's Explorer and into the Honda. Appellant sat in the Explorer and ordered Caserma to follow the Honda, driven by appellant's companion. They drove to a Bank of America branch. Appellant said to Caserma and McConnell, "One of you has gotta die. You better hope your friend comes through with the money." At the bank's automated teller machine (ATM), Sousa withdrew $100 or $150. He gave the money to the man driving the Honda.

After Sousa got back in the Honda, the group drove to Friendship Park. Appellant took Caserma's keys and the victims' shoes and threw them down a hill. Appellant said, "'We are gonna let you guys go. I don't want to hear about this in the paper. We got your I.D.'s.'" He also said, "I know where you live. I know where your family lives." Appellant then wiped down Caserma's Explorer with a shirt and left in the Honda with his companion. They took several items, including Caserma's car stereo and McConnell's backpack. Caserma, Sousa, and McConnell ran into a residential neighborhood, because they feared appellant would return to the park. They called Caserma's stepfather, who called the police.

On December 11, 2005, at about 10:30 p.m., Nicole B. and Eric P. were in Nicole's car, parked at Point Fermin in San Pedro.[2] They were in the back seat, and Nicole was partially unclothed. Appellant and a second man approached the car—appellant on the driver's side and the other man on the passenger's side—and banged on the windows. Three or four additional men, who appeared to be part of appellant's group, were present as well. The men ordered Nicole to open the door, and she complied

[2] Throughout the opinion, we refer to these two victims by their first names to protect their privacy. No disrespect is intended.

because she was afraid. After the men demanded money and valuables, Nicole gave them eight dollars and Eric gave them his diamond earrings. Although Nicole did not see a weapon, she thought appellant might have a gun because he kept his hand in his jacket pocket. Appellant ordered Nicole to orally copulate Eric, which she did, then an unidentified member of the group ordered her to orally copulate the man standing outside the passenger's side of the car, which she did as well. Appellant and the group of men then left in a large truck, apparently because cars were driving up and down the street.

Nicole and Eric did not drive away immediately, because Eric was very angry and got out of the car. A few minutes later, as Nicole was putting on her shoes in order to drive, appellant banged on the driver's side window again. When Nicole opened the door, appellant demanded her keys. When she refused, appellant called her a "bitch" and punched her in the jaw. Appellant ordered Nicole to get in the back seat, and he sat in the driver's seat. Eric was in the front passenger's seat and appellant's companion (identified at trial as Steven) sat in the back seat. Appellant drove Nicole's car to an area unfamiliar to Nicole and stopped in an alley. There, he ordered Nicole to switch seats with Eric, and forced Nicole to orally copulate him twice. Appellant then forced Nicole to engage in intercourse with him.

Appellant next drove to a park. When Nicole said she needed to use the restroom, appellant said he would take her, then dragged her out of the car by her arm. Once they had walked away from the car, appellant refused to take Nicole to the restroom and forced her to orally copulate him again. He then forced her to have intercourse again. She told him she felt sick, but he told her to "keep going." Afterward, he forced her to orally copulate him again. Appellant's companion, Steven, approached as appellant was forcing Nicole to have intercourse for a third time. Steven told appellant to stop, but he did not. After appellant completed the act, Steven told appellant "to stop and think if he would do this to his sisters." Appellant replied, "You gonna take that bitch over me." Steven then returned to Nicole's car, where he had left Eric, and he drove away. Appellant again forced Nicole to orally copulate him.

Shortly thereafter, Steven returned in Nicole's car with Eric. He again joined Nicole and appellant in the park, apparently leaving Eric in the car. Appellant stood up and began walking toward the car. As he did so, Steven helped Nicole run out of the park. Appellant may have tried to chase them in Nicole's car, but Nicole and Steven evaded him. Steven took Nicole to an apartment where he allowed her to use a phone to call a friend to pick her up. Before Nicole's friend arrived, Steven told Nicole that they would kill her if she called the police. When Nicole's friend picked her up, Nicole told her she had been raped. Her friend took her to a hospital, where police were called and a sexual assault examination was performed.

At about 12:55 a.m., on the morning of December 12, 2005, Los Angeles police officer Alex Rojas began to follow a vehicle that did not have its headlights illuminated and matched a description he had heard on a radio call. When the officer activated his lights and siren, the suspect vehicle accelerated, then slowed, and someone jumped out of the driver's side. Other police officers near the scene quickly apprehended appellant, whom Rojas recognized as the man who had jumped out of the vehicle. Officers found Eric waiting next to the vehicle, which had slowed to a stop. He appeared frightened.

The district attorney originally filed the charges connected to the December 1 and December 11 incidents separately. Different co-defendants were charged in connection with the two incidents. For reasons that are neither clear from the record nor relevant to this appeal, the former co-defendants in each matter eventually were dealt with separately. Thereafter, the two cases against defendant were consolidated. As consolidated, the charges against appellant were three counts of kidnapping to commit specified crimes (counts 1, 2, 21), five counts of robbery (counts 3, 5, 6, 17, 18), one count of kidnapping (count 4), one count of assault with a deadly weapon (count 7), three counts of making a criminal threat (counts 8, 9, 10), three counts of dissuading a witness by force or threat (counts 11, 12, 13), one count of possession of a firearm by a felon (count 14), two counts of kidnapping in commission of a carjacking (counts 19, 20), six

counts of forcible oral copulation (counts 22, 23, 24, 25, 26, 27), and three counts of forcible rape (counts 28, 29, 30).[3]

The case was tried to a jury. Caserma and Nicole testified at trial. McConnell and Eric were served with subpoenas, but failed to appear. Sousa testified, but was a reluctant witness and denied being able to identify appellant.

The jury acquitted appellant of count 14, possession of a firearm by a felon; count 17, robbery of Eric; count 19, kidnapping of Eric for carjacking; and count 22, one of the forcible oral copulation counts. Appellant was convicted of all other counts. The jury found the robbery of Sousa, count 3, to be of the first degree. The jury found not true the personal use of a firearm allegation in connection with counts 1 through 6, and it found true the special circumstance of kidnapping in connection with counts 23 through 30. In a bifurcated proceeding, the court found true allegations that appellant had suffered a prior serious felony conviction and had served prior prison terms.

Because of the sentencing issues raised by appellant, we set forth his sentence in detail. The trial court imposed the following consecutive terms:

Count 4 (kidnapping of McConnell): high term of eight years, doubled to 16 years pursuant to the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12);[4]

Count 3 (first degree robbery of Sousa): 16 months (one-third of the middle term), doubled to 32 months;

Count 5 (second degree robbery of Caserma): one year (one-third of the middle term), doubled to two years;

Count 6 (second degree robbery of McConnell): one year (one-third of the middle term), doubled to two years;

Count 7 (assault with a deadly weapon on Caserma): one year (one-third of the middle term), doubled to two years;

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[3] See Section V, *post*, for explanation of inconsistencies in the numbering of counts throughout the record.

[4] The sentences on each of the counts except counts 1, 2, and 20 were imposed pursuant to the Three Strikes law.

Count 8 (criminal threats against Sousa): 8 months (one-third of the middle term), doubled to 16 months;

Count 9 (criminal threats against Caserma): 8 months (one-third of the middle term), doubled to 16 months;

Count 10 (criminal threats against McConnell): 8 months (one-third of the middle term), doubled to 16 months;

Count 11 (dissuading a witness by force or threat on Sousa): one year (one-third of the middle term), doubled to two years;

Count 12 (dissuading a witness by force or threat on Caserma): one year (one-third of the middle term), doubled to two years;

Count 13 (dissuading a witness by force or threat on McConnell): one year (one-third of the middle term), doubled to two years;

Count 18 (second degree robbery of Nicole): one year (one-third of the middle term), doubled to two years;

Count 23 (forcible oral copulation of Nicole): high term of eight years, doubled to 16 years;

Count 24 (forcible oral copulation of Nicole): high term of eight years, doubled to 16 years;

Count 25 (forcible oral copulation of Nicole): high term of eight years, doubled to 16 years;

Count 26 (forcible oral copulation of Nicole): high term of eight years, doubled to 16 years;

Count 27 (forcible oral copulation of Nicole): high term of eight years, doubled to 16 years;

Count 28 (forcible rape of Nicole): high term of eight years, doubled to 16 years;

Count 29 (forcible rape of Nicole): high term of eight years, doubled to 16 years;

Count 30 (forcible rape of Nicole): high term of eight years, doubled to 16 years;[5]

Count 1 (kidnapping of Sousa to commit robbery): life in prison with the possibility of parole;

Count 2 (kidnapping of Caserma to commit robbery): life in prison with the possibility of parole; and

Count 20 (kidnapping of Nicole for carjacking): life in prison with the possibility of parole.

The court stated that sentence on count 21 (kidnapping of Nicole to commit rape) would be stayed. A five-year enhancement for the prior serious felony conviction was added, pursuant to section 667, subdivision (a)(1). The court struck the prior prison term allegation.

Appellant timely appeals from the judgment of conviction.

DISCUSSION

I

Appellant contends the trial court committed reversible error by allowing Detective Katherine Petrash to testify to her opinion regarding the linkage between the two crimes and the failure of certain prosecution witnesses to appear. He argues that such testimony was inadmissible under the rules excluding irrelevant evidence (Evid. Code, § 350), hearsay (Evid. Code, § 1200), and unfairly prejudicial evidence (Evid. Code, § 352).

The portion of Petrash's testimony regarding the linkage between the two crimes was as follows:

> "[Prosecutor:] Now, detective, you said a moment ago that part of the reason you showed this photograph of Raymond Ulloa to Chris Caserma is because the description given to you by some of the victims matched the

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[5] As we shall explain, the trial court imposed a "One Strike" sentence of 25 years to life, pursuant to section 667.61, for one of the sexual offenses, but did not specify the count to which this sentence applied. This is one of the sentencing errors which the trial court is directed to correct.

description in Detective Wickser's case [concerning the December 11 incident]; Is that a fair statement?

"[Petrash:] That's correct.

"[Prosecutor:] Are there any other reasons you happened to select this photograph of Raymond Ulloa and decided to show it to Chris Caserma?

"[Petrash:] Not only did he match the description, but, I mean, the circumstances of the case were very similar, started at a park in San Pedro, involved a carjacking/robbery, transportation of the people ended up at a separate park in San Pedro."

Immediately after that portion of the questioning, the prosecutor asked about law enforcement efforts to secure the appearance of absent witnesses McConnell and Eric:

"[Prosecutor:] Now, a moment ago you mentioned Michael McConnell. Did you make any efforts to secure Mr. McConnell's presence here at trial?

"[Petrash:] Yes, I did.

"[Prosecutor:] What efforts were those?

"[Petrash:] Well, the district attorney investigator usually serves subpoenas for cases at trial. He served him in the past. He hasn't shown up in the past so we went out and attempted to locate him once again to the addresses that he has in the DMV, to addresses that he's been known to frequent, so we could find him and have him present in court.

"[Prosecutor:] Now, as a result of this prior personal service of a subpoena, does Mr. McConnell have any particular legal status now?

"[Petrash:] There is a warrant for his arrest for failure to appear. A subpoena is an order from a judge. It's not just us asking him to come to court. It's an order from the judge to come. He's a party to this investigation, to this process, and so they are required to come to court, and he failed to do so, so there's a warrant out for his arrest.

"[Prosecutor:] And how about Eric P.? Is there also a warrant out for his arrest?

"[Petrash:] Yes.

". . .

"[Prosecutor:] Detective, is there also a warrant for Eric P. in the system?

"[Petrash:] Yes, there is.

"[Prosecutor:] And have you, in fact, accessed those warrants yourself?

"[Petrash:] Yes.

"[Prosecutor:] What is the warrant for Eric P.—what was that issued for?

"[Petrash:] Failure to appear in court, also.

"[Prosecutor:] And did you personally, with Detective Wickser—did you make any efforts to secure the presence of Eric P. at this trial?

"[Petrash:] Yes. I went with Detective Wickser to his residence prior to—on a prior court date trying to locate him. He didn't show up in court that day, either.

"[Prosecutor:] And are you personally aware of efforts from any other officers to locate Eric P.?

"[Petrash:] Yes. I know for a fact there are many people out looking for him.

"[Prosecutor:] To no avail, correct?

"[Petrash:] To no avail."

Defense counsel did not raise any objection to the questioning regarding Petrash's opinion of the linkage between the crimes. With respect to the questioning about the absent witnesses, defense counsel objected on the ground of relevance, but not hearsay or undue prejudice. """[Q]uestions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal."""" (*People v. Williams* (2008) 43 Cal.4th 584, 620; see also Evid. Code, § 353.) Nonetheless, because appellant asserts counsel rendered ineffective assistance by failing to preserve the issue, we address the merits of his argument. (See, e.g., *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 82.)

Appellant does not identify any specific statement which he believes contains inadmissible hearsay. Instead, he cites the entire portion of Petrash's testimony, reproduced above, and asserts that her testimony "was dependent on out-of-court statements that went into documents and other statements from witnesses not before the court." Hearsay is evidence of an out-of-court statement that is offered by its proponent to prove the truth of the matter stated. (Evid. Code, § 1200.)

Petrash's testimony regarding the similarities between the two cases implicitly relied on hearsay police reports. Yet, the testimony is not hearsay because it was offered to explain why Petrash included appellant, initially a suspect only in the December 11 incident, in a photo lineup for the victims of the December 1 incident. It was not offered to prove that appellant actually was involved in both incidents. (See *People v. Samuels* (2005) 36 Cal.4th 96, 122 [out-of-court statement not barred by hearsay rule when offered to explain detective's reasons for obtaining search warrants and contacting witness].) Appellant argues that Petrash's state of mind as to the connection between the two cases is irrelevant because "it was the jury's job to decide who committed the crimes," but he ignores the fact that Petrash's testimony concerned the formation of the photo lineup. In that context, the testimony is relevant because it may have informed the jury's credibility determination.

Petrash's testimony about her attempts to secure the appearances of McConnell and Eric is not hearsay to the extent that it recounts the noncommunicative actions she took. Her claim to "know for a fact" that other people were looking for Eric may have been based on hearsay, but it also may have been based on her personal observations. Had an objection been raised at the time, the prosecution could have attempted to lay a foundation for Petrash's knowledge, or it may have become apparent that Petrash was relying on inadmissible hearsay. One reason evidentiary objections must be raised at trial is to afford the proffering party the opportunity to establish the evidence's admissibility. (*People v. Marks* (2003) 31 Cal.4th 197, 228.)

In any event, assuming for sake of argument that some of Petrash's testimony regarding law enforcement efforts to secure the appearances of McConnell and Eric

crossed the line into inadmissible hearsay, it is not reasonably probable that the error affected the outcome of the trial. (See *People v. Harris* (2005) 37 Cal.4th 310, 336 ["[T]he application of ordinary rules of evidence does not implicate the federal Constitution, and thus we review allegations of error under the 'reasonable probability' standard of *People v. Watson* (1956) 46 Cal.2d 818, 836."].) Contrary to appellant's assertion, Petrash's testimony did not imply that the missing witnesses would have testified favorably to the prosecution, nor is it probable that the jury filled in evidentiary gaps with speculation about what the missing witnesses would have said. Instead, the jury's verdict was amply supported by the testimony of the two victims who positively identified appellant at trial.

Appellant further argues that "Evidence Code section 352[6] prohibits introduction of most of this highly prejudicial evidence." He asserts that "Petrash's opinions and thought processes had no probative value" and were "exceedingly prejudicial." As already noted, appellant did not raise this objection at trial. The closest he came was a relevance objection to the testimony regarding the absent witnesses, in which defense counsel argued, "I don't see where it is relevant other than causing maybe undue speculation by the jurors as to why these people may or may not be here. They may think, well, they may be fearful, they may think that perhaps what they told the police the first time isn't accurate. Whatever the reasons may be, I think we are asking the jurors to speculate." The district attorney argued that the evidence was relevant because the credibility of the police investigation would be undermined if no effort had been made to secure the testimony of all the named victims. The trial court overruled the objection, agreeing with the district attorney as to the relevance of the testimony.

We conclude that Petrash's testimony did have probative value as it bore on the credibility of the investigation. And the prejudice to appellant, if any, was minimal.

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

"""The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against . . . [one party] as an individual and which has very little effect on the issues.""" (*People v. Garceau* (1993) 6 Cal.4th 140, 177, disapproved on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.) Appellant fails to explain how testimony about the police investigation and efforts to subpoena witnesses was likely to evoke an emotional bias against him. He simply argues that the jury was likely to speculate about what the missing witnesses would have said. This is itself mere speculation.

We find no prejudicial error in the admission of Petrash's testimony. Accordingly, appellant's counsel was not ineffective for failing to object.

II

Appellant next contends the prosecutor committed prejudicial misconduct in two instances during closing argument. As a preliminary matter, the Attorney General's argument that this issue was forfeited by defense counsel's failure to object is well taken. """[A] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.""" (*People v. Rundle* (2008) 43 Cal.4th 76, 157, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Appellant acknowledges that no objection was raised at the time of the alleged misconduct, but contends defense counsel offered ineffective assistance by failing to object.

"A defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel's inaction violated the defendant's constitutional right to the effective assistance of counsel." (*People v. Lopez* (2008) 42 Cal.4th 960, 966.) Yet our Supreme Court has cautioned, "The appellate record . . . rarely shows that the failure to object was the result of counsel's incompetence; generally, such claims are more appropriately litigated on habeas corpus, which allows for an evidentiary hearing where the reasons for defense counsel's actions or omissions can be explored." (*Ibid.*) In any event, we conclude the prosecutor did not

commit prejudicial misconduct during her closing argument. Accordingly, defense counsel was not ineffective for failing to object.

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it 'infects the trial with such unfairness as to make the conviction a denial of due process.' [Citations.] In other words, the misconduct must be 'of sufficient significance to result in the denial of the defendant's right to a fair trial.' [Citation.] A prosecutor's conduct '"that does not render a criminal trial fundamentally unfair"' violates California law '"only if it involves '"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'"'" (*People v. Coffman and Marlow, supra,* 34 Cal.4th at p. 92.) "To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*People v. Frye* (1998) 18 Cal.4th 894, 970, disapproved on another ground in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.)

Both instances of alleged misconduct arise out of the same portion of the prosecutor's closing argument. The prosecutor described appellant as a predator, and compared his selection of vulnerable victims to a wolf's selection of a weak rabbit as its prey. She concluded by saying, "[Ulloa] set his sights on five victims who he thought were too weak to resist him and too weak to ever come back and cause him any problem. He was completely right about two-and-a-half of them, Mike McConnell, Eric P., and to some extent Brian Sousa, but he was very, very wrong about two of his victims, Nicole B. and Chris Caserma, who have pursued this case with determination and with courage. Please don't let their strength be wasted. Come back with guilty verdicts." Appellant argues that the prosecutor's argument regarding McConnell and Eric improperly assumes facts not in evidence as to why they failed to appear to testify. He also asserts that the prosecutor's request that the jury not allow the "strength" of Nicole and Caserma to be "wasted" was an improper appeal to the sympathy and emotions of the jurors.

"'Counsel may not state or assume facts in argument that are not in evidence. [Citation.] That said, we accord counsel great latitude at argument to urge whatever conclusions counsel believes can properly be drawn from the evidence.'" (*People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1323.) """"The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom.'""" (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

We conclude that the prosecutor's statement that appellant targeted victims he believed to be weak and that he was right about McConnell and Eric being weak was fair comment on the evidence. The evidence showed that all of the victims were in vulnerable positions when approached by appellant. McConnell, Sousa, and Caserma were in a parked car preparing to engage in the illegal activity of smoking marijuana. Nicole and Eric had just engaged in sexual activity in a parked car, and Nicole was partially undressed. A reasonable inference may be drawn that appellant did not expect victims engaged in illegal or embarrassing activities to make reports to the police. Additionally, Nicole and Caserma testified that appellant or his accomplice threatened to harm them or their families if they reported the crimes to law enforcement. The evidence showed that Eric and McConnell did not respond to subpoenas, despite being subject to arrest warrants for failure to appear in court in connection with this case. A reasonable inference may be drawn that Eric and McConnell did not want to testify at trial. The prosecutor's description of these victims as "weak" due to their failure to testify against appellant is the sort of colorful rhetoric which is permissible during closing argument. "'A prosecutor may properly identify the traits that made the victim vulnerable to attack when such characteristics are relevant to the charged crimes, and has no obligation . . . "to describe relevant events in artificially drab or clinical terms."'" (*People v. Wilson* (2005) 36 Cal.4th 309, 338.)

With respect to the prosecutor's appeal to the jury to return a guilty verdict so as not to allow the "strength" of Nicole and Caserma to be "wasted," we again conclude that the prosecutor stayed within the bounds of permissible argument. The general rule is that

"'[a]n appeal for sympathy for the victim is out of place during an objective determination of guilt.'" (*People v. Kipp* (2001) 26 Cal.4th 1100, 1130.) Under this rule, our Supreme Court has found improper arguments that ask the jurors to imagine themselves in the victim's place. (See, e.g., *People v. Leonard* (2007) 40 Cal.4th 1370, 1407 [improper to ask jury to imagine the thoughts of the victims in the last seconds of life]; *People v. Stansbury* (1993) 4 Cal.4th 1017, 1057, revd. on other grounds in *Stansbury v. California* (1994) 511 U.S. 318 [improper to ask jury to consider the suffering of a child victim of violent assault].) But it is not misconduct for a prosecutor to portray a victim in a sympathetic light or to point out inferences favorable to the prosecution that may be drawn about the credibility of a victim's testimony. (See, e.g., *People v. Lopez, supra*, 42 Cal.4th at pp. 968-970 [not improper to ask jurors to imagine themselves as victims of hypothetical assault for purpose of highlighting which details would likely be recalled years later]; *People v. Taylor* (2001) 26 Cal.4th 1155, 1167 [not improper to call jury's attention to the physical harm suffered by victim in order to explain minor mistakes in victim's testimony); *People v. Frye*, *supra*, 18 Cal.4th at pp. 974-975 [not improper to describe victims as "'kind and trusting people'"]; *People v. Pitts* (1990) 223 Cal.App.3d 606, 704-705 [not improper to refer to child's sad demeanor during her testimony when urging inference that her retraction of abuse allegation was false].)

In the present case, appellant was charged with crimes against five victims, but only three of the victims testified at trial, and one of those testified that he could not identify appellant. Given that much of the defense's closing argument focused on the victims who did not appear at trial, it was reasonable for the prosecution to argue vigorously that the jury should credit the victims who did testify. In order to explain to the jury why two of the victims did not appear at trial, the prosecution characterized the testifying witnesses as "strong" and the missing witnesses as "weak." As explained above, there was evidence from which the prosecutor could fairly infer that Eric and McConnell chose not to testify, and she could vividly characterize this choice as

weakness. Similarly, the prosecutor could fairly characterize Nicole's and Caserma's choice to testify as demonstrating strength.

Even if we were to assume that it was improper for the prosecutor to imply that the jury would be letting the witnesses' strength go to waste if it did not return a guilty verdict, there is no reasonable probability appellant was prejudiced by the remark. The remark was brief and isolated. (See *People v. Medina* (1995) 11 Cal.4th 694, 759-760 [no reasonable probability jury's guilt determination was influenced by prosecutor's brief and isolated request that the jury "'do the right thing . . . do justice'" for murder victim].) The prosecutor made the argument prior to the defense's closing argument, meaning that appellant's trial counsel had an opportunity to respond. There is no indication that the verdict was based on passion or prejudice, particularly since the jury acquitted appellant of all of the counts involving Eric, one count of forcible oral copulation of Nicole, and all of the firearm-related counts and allegations. Appellant's conviction of the remaining counts was supported by overwhelming evidence of guilt, including the unequivocal identification of appellant by Caserma and Nicole, DNA evidence from Nicole's sexual assault examination, and testimony that appellant was located by law enforcement shortly after Nicole's escape, driving Nicole's car with Eric still in it.

III

Appellant contends the sentence imposed by the trial court violates section 654, which prohibits double punishment for a single act or indivisible course of conduct. Specifically, he challenges the following pairs of consecutive sentences as duplicative: kidnapping of Caserma for the purpose of robbery (count 2) and second degree robbery of Caserma (count 5); kidnapping of Sousa for the purpose of robbery (count 1) and first degree robbery of Sousa (count 3); kidnapping of Nicole for carjacking (count 20) and aggravated kidnapping allegation as to sexual offenses (counts 23-30).

Section 654 states, in relevant 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." "Using the indivisible transaction

rule, courts have expanded the scope of section 654, which by its terms prohibits multiple punishment only of '[a]n act or omission which is made punishable in different ways by different [Penal Code] provisions,' also to prohibit multiple punishment of separate acts, committed incident to one objective, which comprise an indivisible course of conduct." (*People v. Hicks* (1993) 6 Cal.4th 784, 790.) "'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.'" (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) "If, however, a defendant had several independent criminal objectives, he may be punished for each crime committed in pursuit of each objective, even though the crimes shared common acts or were parts of an otherwise indivisible course of conduct. [Citation.] The defendant's intent and objective are factual questions for the trial court, and we will uphold its ruling on these matters if it is supported by substantial evidence." (*People v. Perry* (2007) 154 Cal.App.4th 1521, 1525.)

With respect to the sentences imposed for the second degree robbery of Caserma and the kidnapping of Caserma for robbery, the trial court's implied finding of separate criminal objectives is supported by substantial evidence. The prohibition against multiple punishment "has been applied to preclude separate punishment for the crimes of robbery and kidnapping for the purpose of committing that same robbery." (*People v. Smith* (1992) 18 Cal.App.4th 1192, 1197.) But a course of criminal conduct may give rise to two distinct offenses when a defendant first intends only to rob a victim of the contents of his or her wallet, but then discovers an ATM card and decides to kidnap the victim to withdraw money. (*Id.* at pp. 1197-1199; *People v. Porter* (1987) 194 Cal.App.3d 34, 38-39.) During the initial encounter at Joan Milke Flores Park, appellant searched Caserma's wallet and took his identification. After discovering that Sousa had an ATM card, appellant kidnapped Caserma to facilitate the robbery at the ATM. The robbery in the park and the robbery at the ATM were separate and distinct events. It is of no consequence that Caserma was not the intended victim of the robbery at the ATM. "A

defendant may be convicted of kidnapping for robbery when the kidnapping and the intended robbery pertain to different victims . . . if the defendant kidnaps one individual in order to prevent that person from spreading an alarm about a simultaneous robbery of a second person." (*People v. James* (2007) 148 Cal.App.4th 446, 452-453.) Accordingly, the kidnapping of Caserma to facilitate the robbery at the ATM is distinct from the robbery of Caserma's identification in the park, and consecutive sentences for these offenses are not barred by section 654.

In contrast, with respect to the first degree robbery of Sousa and the kidnapping of Sousa for robbery, consecutive sentences were improperly imposed for robbery and kidnapping for the purpose of committing the same robbery. Respondent asserts the conviction for the robbery of Sousa should be treated the same way as the conviction for the robbery of Caserma, arguing that there is substantial evidence of an initial robbery, followed by a kidnapping for the purpose of a separate robbery. But the jury's verdict on count 3, the first degree robbery of Sousa, was based on the robbery at the ATM. With respect to the degrees of robbery, the jury was instructed, "To prove that the defendant is guilty of first-degree robbery, the people must prove that the robbery was committed while the person robbed was using or had just used an ATM machine and was still near the machine. All other robberies are of the second degree." Since the jury found appellant guilty of the first degree robbery of Sousa, it must have been relying on the robbery at the ATM, not the robbery at the park. The kidnapping and robbery at the ATM machine were committed "'pursuant to [the] single intent or objective'" of robbing Sousa of the cash in his bank account. (*People v. Lewis* (2008) 43 Cal.4th 415, 519.) Accordingly, one of the sentences must be stayed. Section 654 directs the trial court to impose punishment under the provision that allows for the longest term of imprisonment, which in this case is count 1 (kidnapping of Sousa for robbery). Thus, the sentence for count 3 (first degree robbery of Sousa) must be stayed.

Finally, with respect to the crimes against Nicole, appellant contends that the sentence for kidnapping for carjacking must be stayed because the same kidnapping was used by the trial court to impose a One Strike sentence pursuant to section 667.61. We

conclude there is substantial evidence to support the trial court's implied finding that appellant committed two acts of kidnapping with respect to Nicole. First, after appellant punched Nicole and climbed in the driver's seat of her car, he drove her from Point Fermin to an alley. For this act of kidnapping, the court imposed sentence on count 20, kidnapping for carjacking. Second, after stopping in the alley and sexually assaulting Nicole, appellant drove approximately 10 minutes from the alley to a park where he dragged her out of the car, walked her away from the car, and sexually assaulted her. For this separate act of kidnapping, the court imposed a One Strike sentence under section 667.61.

The statutory scheme under which appellant was sentenced directs the court to maximize the sentence imposed by relying on the minimum number of circumstances required for One Strike sentencing and using additional circumstances as the basis for a punishment or enhancement authorized by any other law. Section 667.61, former subdivision (f), as in effect at the time of the crimes, provided: "If only the minimum number of circumstances specified in subdivision (d) or (e) which are required for the punishment provided in subdivision (a) or (b) to apply have been pled and proved, that circumstance or those circumstances shall be used as the basis for imposing the term provided in subdivision (a) or (b) rather than being used to impose the punishment authorized under any other law, unless another law provides for a greater penalty. However, if any additional circumstance or circumstances specified in subdivision (d) or (e) have been pled and proved, the minimum number of circumstances shall be used as the basis for imposing the term provided in subdivision (a), and any other additional circumstance or circumstances shall be used to impose any punishment or enhancement authorized under any other law. Notwithstanding any other law, the court shall not strike any of the circumstances specified in subdivision (d) or (e)."[7] In this case, the trial court

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[7] The jury found true the following specified circumstance: "The defendant kidnapped the victim of the present offense and the movement of the victim substantially increased the risk of harm to the victim over and above that level of risk necessarily inherent in the underlying offense . . . ." (§ 667.61, subd. (d)(2).)

followed the statute's directive by using one act of kidnapping for purposes of One Strike sentencing and using the other act of kidnapping to impose punishment under section 209.5. Although appellant was separately convicted of kidnapping to commit rape, the trial court correctly stayed the sentence for that count.

Finally, we agree with appellant that the record is unclear regarding the count to which the trial court intended the One Strike sentence of 25 years to life to apply. It appears from the transcript of the sentencing hearing that the court imposed determinate sentences of 16 years on each of the counts of forcible oral copulation and forcible rape (counts 23-30). The court went on to say, "There was one enhancement found to be true so far as 667.61. So the indeterminate sentence of 25 years to life on that count." For the reasons explained below, we must remand this case for resentencing. On remand, the trial court shall clarify which count is to be punished pursuant to section 667.61, and it shall ensure that the abstract of judgment is corrected accordingly.

IV

The trial court found that appellant had suffered a prior conviction of a serious felony for the purposes of the Three Strikes law's sentencing provisions (§ 1170.12) as well as a five-year enhancement (§ 667, subd. (a)). Appellant contends that the trial court's finding that his prior conviction was a serious felony is not supported by sufficient evidence. We agree.

During the court trial on the prior conviction allegation, the prosecution's only evidence regarding the nature of the prior offense was a prison packet submitted pursuant to section 969b, which contained two abstracts of judgment, two fingerprint cards, a chronological history, and a photograph of appellant. The relevant abstract of judgment showed that in 2004 appellant was convicted of "PC 186.22(D) ASSIST IN CRIM CONDUCT W/GANG." Appellant had been convicted by plea agreement and sentenced to the upper term of three years. The trial court found that appellant suffered a conviction "for violation of Penal Code section 186.22[, subdivision] (d), assisting in criminal conduct with gang," and concluded that such a violation was a serious felony within the meaning of section 1192.7, subdivision (c)(28).

Among the serious felonies listed in section 1192.7, subdivision (c), is "any felony offense, which would also constitute a felony violation of Section 186.22." (§ 1192.7, subd. (c)(28).) Appellant contends that the description on the 2004 abstract of judgment is insufficient to support the trial court's finding because section 186.22, subdivision (d), is an alternate penalty provision, not a substantive offense, and hence applicable to a person convicted of either an underlying felony or misdemeanor. He points out that no evidence was presented as to whether the underlying substantive offense of which he was convicted was a felony or a misdemeanor. We must therefore determine whether the definition of "serious felony" includes a misdemeanor offense that was sentenced as a felony pursuant to the alternate penalty provision of section 186.22, subdivision (d). This appears to be a matter of first impression, as we have found no published cases addressing the question, and our Supreme Court expressly declined to state an opinion on the matter in *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 907, footnote 17.

A

A defendant is subject to doubled sentences and a five-year sentence enhancement when convicted of any felony if he or she already has been convicted of a serious felony. (§§ 667, subd. (a), 1192.7, subd. (c).) Section 1192.7, subdivision (c), enumerates the felony violations which qualify as serious felonies, and includes "any felony offense, which would also constitute a felony violation of Section 186.22." (§ 1192.7, subd. (c)(28).)

The only substantive offense contained in section 186.22 is found in subdivision (a).[8] (*People v. Briceno* (2004) 34 Cal.4th 451, 460, fn. 7 (*Briceno*).) Our Supreme Court has described the remaining provisions of the statute as follows: "Section 186.22(b)(1), because it adds an additional term of imprisonment to the base term of the

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[8] "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years." (§ 186.22, subd. (a).)

underlying felony offense, is a sentence enhancement. [Citations.] Section 186.22, subdivision (d) is an alternate penalty provision that applies to a person convicted of a gang-related misdemeanor offense.[9] [Citation.] Section 186.22, subdivision (b)(5) is an alternate penalty provision that applies to any gang-related underlying felony 'punishable by imprisonment in the state prison for life.' [Citation.] Section 186.22, subdivision (b)(4) is an alternate penalty provision that provides for an indeterminate life sentence for certain underlying felony offenses that are gang related. [Citation.] Neither is section 186.22, subdivision (b)(2) a substantive offense, for it provides that if the underlying felony described in section 186.22(b)(1) is committed on school grounds, 'that fact shall be a circumstance in aggravation of the crime in imposing a term under [the section 186.22(b)(1)]' enhancement. The remaining subdivisions of section 186.22 do not describe sentence enhancements, substantive offenses, or alternate penalty provisions; they simply define various terms used in section 186.22 (e.g., § 186.22, subds. (e), (f), (i)), or provide directions to the trial court upon sentencing (e.g., § 186.22, subds. (b)(3), (c), (g))." (*Briceno*, *supra*, 34 Cal.4th at p. 460, fn. 7.)

It is undisputed that the substantive offense of active participation in a street gang, as defined in section 186.22, subdivision (a), is a serious felony pursuant to section 1192.7, subdivision (c)(28). (See, e.g., *Briceno*, *supra*, 34 Cal.4th at pp. 458-459.) In *Briceno*, the court held that the term "felony violation," as used in section 1192.7, subdivision (c)(28), also includes a sentence enhancement under section 186.22, subdivision (b)(1). (*Id*. at p. 456.) Respondent contends that this holding extends to offenses punished as felonies under section 186.22, subdivision (d). Yet there are important distinctions between subdivision (b)(1) and subdivision (d) of section 186.22.

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[9] "By definition, a sentence enhancement is 'an additional term of imprisonment added to the base term.' (Cal. Rules of Court, rule 4.405(c); [citation].) Section 186.22(d) is not a sentence enhancement because it does not add an additional term of imprisonment to the base term; instead, it provides for an alternate sentence when it is proven that the underlying offense has been committed for the benefit of, or in association with, a criminal street gang." (*Robert L. v. Superior Court*, *supra*, 30 Cal.4th at pp. 898-899.)

Imposition of a sentence enhancement pursuant to section 186.22, subdivision (b)(1), will occur only when the underlying crime is a felony.[10] In contrast, the alternate sentencing provisions of section 186.22, subdivision (d), apply when a person is convicted of either a felony or a misdemeanor, as long as the offense was committed "for the benefit of, at the direction of or in association with, any criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by gang members." If sentenced pursuant to this provision, a defendant "shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison for one, two, or three years, provided that any person sentenced to imprisonment in the county jail shall be imprisoned for a period not to exceed one year, but not less than 180 days, and shall not be eligible for release upon completion of sentence, parole, or any other basis, until he or she has served 180 days. If the court grants probation or suspends the execution of sentence imposed upon the defendant, it shall require as a condition thereof that the defendant serve 180 days in a county jail." (§ 186.22, subd. (d).)

By authorizing a sentence of imprisonment for one, two, or three years, subdivision (d) grants the trial court discretion to treat a misdemeanor offense as a felony for the purpose of imposing sentence for that offense. (*People v. Arroyas* (2002) 96 Cal.App.4th 1439, 1444.) Yet, a misdemeanor which is treated as a felony for sentencing purposes under subdivision (d) is not treated as a felony for every purpose. For example, a misdemeanor sentenced as a felony under section 186.22, subdivision (d),

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[10] "Except as provided in paragraphs (4) and (5), any person who is *convicted of a felony* committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows: [¶] (A) Except as provided in subparagraphs (B) and (C), the person shall be punished by an additional term of two, three, or four years at the court's discretion. [¶] (B) If the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years. [¶] (C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years." (§ 186.22, subd. (b)(1), italics added.)

may not be "'bootstrap[ped]'" into the enhancement provision for felonies in subdivision (b)(1). (*Briceno*, *supra*, 34 Cal.4th at p. 465, citing *People v. Arroyas*, *supra*, 96 Cal.App.4th at p. 1445.)

Section 186.22, subdivision (b)(1), also differs from section 186.22, subdivision (d), with respect to its use in other statutory provisions. In *Briceno*'s analysis of whether an enhancement under subdivision (b) was a serious felony pursuant to section 1192.7, subdivision (c)(28), the court found it relevant that "another felony reenacted by Proposition 21,[11] Welfare and Institutions Code section 707, subdivision (b)(21), specifically refers to the term 'felony violation' as encompassing the section 186.22(b)(1) gang sentence enhancement. Welfare and Institutions Code section 707, subdivision (b)(21) establishes a presumption that a 16-or 17-year-old minor is 'not a fit and proper subject to be dealt with under juvenile court law' where he or she is charged with '[a]ny violent felony, as defined in subdivision (c) of Section 667.5 of the Penal Code, *which would also constitute a felony violation of subdivision (b) of Section 186.22 of the Penal Code.*' (Italics added.) . . . . The phrase in Welfare and Institutions Code section 707, subdivision (b)(21), 'which would also constitute a felony violation,' is *identical* to its counterpart in section 1192.7, subdivision (c)(28), and its meaning is clear: the Legislature, and now the voters, intended that the term 'felony violation' in Proposition 21 include the section 186.22(b)(1) gang sentence enhancement." (*Briceno*, *supra*, 34 Cal.4th at pp. 461-462.) Unlike subdivision (b), subdivision (d) of section 186.22 does not appear in Welfare and Institution Code section 707's list of violations which render a juvenile offender presumptively ineligible to be dealt with under juvenile court law. Similarly, section 12022.53, subdivision (e), authorizes a sentence enhancement when *any principal* involved in the offense personally used a firearm, only if the defendant violated section 186.22, subdivision (b). Simply pleading and proving

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[11] Section 186.22, subdivision (d), and section 1192.7, subdivision (c)(28), were both added to the Penal Code as a result of Proposition 21, a ballot measure passed by the electorate in 2000. (See *Briceno*, *supra*, 34 Cal.4th at p. 456; *Robert L. v. Superior Court*, *supra*, 30 Cal.4th at p. 897.)

the elements of section 186.22, subdivision (d), does not make section 12022.53, subdivision (e), applicable.

Finally, although our Supreme Court has not spoken definitively as to whether a misdemeanor sentenced as a felony pursuant to section 186.22, subdivision (d), is a serious felony for the purpose of section 1192.7, subdivision (c)(28), the court's rationale with respect to another question suggests that it would not interpret the term "serious felony" to include such an offense. In *Briceno*, the court rejected the defendant's contention that a "felony violation" under section 1192.7, subdivision (c)(28), only referred to the substantive offense found in section 186.22, subdivision (a). (*Briceno, supra*, 34 Cal.4th at p. 462.) To explain the language of section 1192.7, subdivision (c)(28), the court referred to *Robert L. v. Superior Court*, *supra*, 30 Cal.4th 894, which held that a misdemeanor offense committed for the benefit of a criminal street gang could be punished as a felony under section 186.22, subdivision (d). The court then reasoned, "[T]he section 1192.7(c)(28) phrase, 'felony violation of Section 186.22,' simply distinguishes crimes that are felonies *regardless* of section 186.22 from crimes that are initially misdemeanors, but become felonies *by virtue of* section 186.22." (*Briceno, supra*, 34 Cal.4th at p. 462.) It thus appears that for purposes of section 1192.7, subdivision (c)(28), the court would distinguish between those types of crimes.

For these reasons, we conclude that the section 1192.7, subdivision (c)(28), definition of a serious felony as a "felony offense, which would also constitute a felony violation of Section 186.22" does not include a misdemeanor punished as a felony pursuant to section 186.22, subdivision (d).

B

Because there is no evidence in the record to show whether appellant's prior conviction was for a felony or for a misdemeanor punished as a felony, the trial court's true finding regarding the prior conviction of a serious felony allegation is not supported by substantial evidence. The only violation which appears on the abstract of judgment for appellant's 2004 conviction is section 186.22, subdivision (d). Because section 186.22, subdivision (d), does not define a substantive offense, appellant must have been

convicted of a different substantive offense, then sentenced pursuant to the alternate penalty provision of section 186.22, subdivision (d). (See *Robert L. v. Superior Court*, *supra*, 30 Cal.4th at p. 898.) The substantive offense of which appellant was convicted could have been either a misdemeanor or a felony. "'"[W]hen the record does not disclose any of the facts of the offense actually committed, the court will presume that the prior conviction was for the least offense punishable."'" (*People v. Banuelos* (2005) 130 Cal.App.4th 601, 607.) Because the record does not disclose the substantive offense underlying appellant's 2004 conviction, we must presume that he was convicted of a misdemeanor. For the reasons explained above, a misdemeanor conviction is not a serious felony for the purposes of section 1192.7, even if a felony sentence is imposed pursuant to section 186.22, subdivision (d).

On remand, the People may present additional evidence to establish that appellant's prior conviction was a serious felony for the purposes of section 1192.7. "Neither double jeopardy nor due process bars a retrial on the prior conviction allegation." (*People v. Banuelos*, *supra*, 130 Cal.App.4th at p. 607.)

V

Respondent asserts that the abstract of judgment contains errors which require correction. We agree, as does appellant. "Courts may correct clerical errors at any time, and appellate courts . . . that have properly assumed jurisdiction of cases have ordered correction of abstracts of judgment that did not accurately reflect the oral judgments of sentencing courts." (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

The numbering of the counts on the abstract of judgment is inconsistent with the numbering of the counts on the verdict forms. Prior to the consolidation of the two cases against appellant, the counts connected to the December 11 incident were numbered 15 through 28. After the cases were consolidated, the court ordered the counts connected to the December 11 incident renumbered as 17 through 30. The verdict forms and the trial court's oral pronouncement of sentence correspond to the renumbered counts. The abstract of judgment and minute order from the sentencing hearing incorrectly use the pre-consolidation numbering to refer to the counts. The abstract of judgment must be

amended to reflect the numbering of the counts so that they are consistent with the pronouncement of the trial court. Counts 15 through 28 must be renumbered as counts 17 through 30.

Other clerical errors which require correction in order to reflect the pronouncement of the trial court are as follows: the sentence imposed for counts 1 and 2 should appear as life with the possibility of parole rather than 25 years to life; the sentence of life with the possibility of parole for count 20 (kidnapping for carjacking) must be added to the abstract; two additional counts of forcible oral copulation must be added to the abstract.

Because the matter is to be remanded for resentencing, as explained above, we do not address the parties' other contentions about errors on the abstract of judgment. These concerns may be dealt with by the trial court on remand.

DISPOSITION

The judgment of conviction is affirmed. The sentence imposed for count 3 is stayed. The trial court is directed to clarify the count to which section 667.61 applies. The true finding on the prior serious felony conviction allegation is reversed and the sentence is vacated. The case is remanded for a retrial on the prior conviction allegation if the People so elect, or for a new sentencing hearing if the People do not timely go forward on the prior conviction allegation. After resentencing, the trial court is directed to prepare a modified abstract of judgment consistent with this opinion and forward it to the Department of Corrections and Rehabilitation.

CERTIFIED FOR PARTIAL PUBLICATION

EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.