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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE, Plaintiff and Respondent, v. DAVID ALLEN NICHOLS, Defendant and Appellant.	C057665 (Super. Ct. No. 62-052831)

APPEAL from a judgment of the Superior Court of Placer County, James D. Garbolino, Judge. Affirmed as modified.

Joseph Shipp, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Charles A. French and Craig S. Meyers, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.110, this opinion is certified for publication with the exception of parts I through VIII and X.

This case presented a simple factual question for the jury to resolve -- did defendant David Allen Nichols, a convicted sex offender required to register under former Penal Code section 290, register with the Rocklin Police Department within five days of moving out of Rocklin? The jury determined he did not, in violation of former Penal Code section 290, subdivision (f)(1).[1] (See current § 290.013, subd. (a).)

The jury also determined, however, that defendant had previously been convicted of three felonies and found true the allegation that these felonies constituted serious felonies within the meaning of the "Three Strikes" law. (§§ 1170.12, subds. (a)-(d); 667, subd. (b)-(i).) In addition, the trial court determined defendant had served three prior prison terms within the meaning of section 667.5, subdivision (b).

The trial court denied defendant's motion to strike his prior "strike" convictions, and it sentenced him to a prison term of 28 years to life: 25 years to life on the failure to register, plus one year for each of the prior prison terms.

Defendant appeals, alleging the following to be prejudicial errors:

1. The trial court admitted excessive and inflammatory evidence;

2. The prosecutor committed misconduct;

3. The court committed instructional error;

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[1] All subsequent undesignated references to sections are to the Penal Code.

4. The true findings on the "strike" priors were not supported by substantial evidence;

5. The true findings on two of the prior prison term findings were not supported by substantial evidence;

6. The court erred in refusing to submit any prior conviction issues, except authentication, to the jury;

7. Theses errors constituted cumulative error;

8. The court abused its discretion when it denied defendant's motion to strike his prior strikes;

9. The prison sentence under the Three Strikes law constituted cruel and unusual punishment; and

10. The abstract of judgment must be corrected to recite the correct statutory authority for the prior prison term enhancements.

Except to order the abstract of judgment corrected, we affirm the judgment.

FACTS

Testifying at trial, defendant admitted three prior felony convictions. He was convicted in 1978 in Oregon of robbery; in 1982 of armed bank robbery, a federal offense; and in 1996 in Humboldt County of forcible oral copulation in violation of section 288a. Defendant committed this last offense in 1994 while he was on federal parole.

Defendant knew he was required to register under section 290 as a result of his sex offense conviction. Indeed, when asked if he was aware of his requirement to register, defendant replied, "Yes, pretty deeply actually." After completing his

state prison sentence on the sex crime, he served four more years in prison due to the federal parole violation. During this incarceration and while serving as the head education clerk, he helped assemble a database of resources inmates could use upon their release. As part of this process, he specifically researched the registration requirements imposed on him under California law. He knew he had to register each time he moved.[2]

Defendant was released from custody in November 2004. Dayna Ward, a federal parole officer, supervised defendant. She had supervised him briefly in 1994 when he was first placed on federal parole. She met with defendant upon his release from state prison in 2004 and reviewed with him a notice of requirements for sex offender registration. Defendant signed the form, and Officer Ward directed him to register within five days.

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[2] At the time of defendant's actions here, former section 290 required defendant to register with the chief of police of the city where he was residing within five working days of moving into the city. (Former § 290, subd. (a)(1)(A); Stats. 2004, ch. 761, § 1.3.) If he moved out of that city, he had to notify his former city's police chief of his new address within five working days, as well as register with the police chief of his new city. (Former § 290, subd. (f)(1); Stats. 2004, ch. 761, § 1.3.) If he became transient, he had five working days within which to register in the jurisdiction in which he was present on the fifth day, and he had to register once every 30 days in whatever jurisdiction he was present. (Former § 290, subd. (a)(1)(C)(i); Stats. 2004, ch. 761, § 1.3.) Defendant also had to register annually within five working days of his birthday, regardless of where he was living. (Former § 290, subd. (a)(1)(C)(iii), (a)(1)(D); Stats. 2004, ch. 761, § 1.3.)

Officer Ward also reviewed with defendant his conditions of parole. One of those conditions required defendant to notify his parole officer within two days of any change of his residence. Another condition prohibited defendant from leaving or moving out of the boundaries of the federal judicial Eastern District of California without prior approval from a parole officer.

In December 2004, upon his release from custody, defendant registered in Sacramento, the city where he lived. He registered again in Sacramento on January 24, 2005, upon changing his address. He registered in Sacramento a third time upon his birthday, February 15, 2005, as required by former section 290.

In early March 2005, defendant moved to a new residence on Aitken Dairy Road in Rocklin. He leased his Rocklin residence along with five other tenants: Eliza Edwards; defendant's business partner, Jim Dresser; a Russian couple; and the homeowner's father.

Upon moving to Rocklin, defendant registered with the Rocklin Police Department. He also informed Officer Ward of his new address. (There was no record, however, that he notified the Sacramento Police Department of his move to Rocklin. Defendant was not charged with this omission.)

In early April 2005, defendant left the Eastern District without permission from his parole officer and he moved out of the Rocklin house. On or about April 4, defendant told cotenant Edwards he had had an altercation with Dresser, and he asked if

she would take care of his cat. He said he had to go and that he would be back. She heard him leave on his motorcycle. She never saw him again at the house.

Defendant testified that he drove to Big Sur, looked at the ocean, and then decided to go back. On April 7, 2005, he went into the parole office to speak with Officer Ward. She was on vacation, so he met with her supervisor, Officer Richard Ertola. He told Officer Ertola he had left the district on April 4. Officer Ertola took the violation under advisement, and he told defendant to contact Officer Ward on April 18.

However, defendant testified that after meeting with Officer Ertola, he got on his motorcycle and left. He never went back to Rocklin. He also had no further contact with Officer Ward.

Defendant drifted around the country, attending shows and festivals, and "hiding out with the hippies." He was arrested on December 31, 2005, in San Francisco. He gave a false name to the police when he was arrested because, he said, he knew he had violated his parole.

The factual dispute at trial, which the jury decided against defendant, centered on whether defendant complied with his section 290 registration requirements when he "moved" from his Rocklin residence. Clerks from the Rocklin Police Department identified defendant's registration dated March 14, 2005, which defendant filed when he moved to Rocklin. One of the clerks who reviewed defendant's registration that day, Deeann Ralphs, noticed he had not provided any information about

vehicles he owned. Defendant said he did not own any, so she wrote "NA" on the form. She would not have written NA unless he had told her he did not own any vehicles.

Ralphs, who was the police department's custodian of records, said defendant did not register again with the Rocklin police department because there were no additional registration forms in the file. Defendant had submitted a copy of his lease for the Aitkin Dairy Road residence, but there were no records in the file indicating defendant had changed his address after March 14, 2005.

Defendant, however, testified he returned to the Rocklin police department twice after registering there on March 14, both times in response to the clerks' request that he provide proof of his residence and vehicle information. On the first occasion, he went in without an appointment to drop off a copy of his lease agreement.

The second occasion occurred in April right before he left for Big Sur. He claimed that on this visit, he completed a form to provide the department with the vehicle identification number from his motorcycle. Where the form asked for his address, defendant wrote his Aitkin Dairy Road address and then wrote the words "in transit" after it. He gave the completed form to a clerk and left. He did not receive a copy of the form. It was defendant's understanding that writing the word "transit" on the form satisfied his obligation to inform the police department of his move out of Rocklin since he did not know where he would be living and he would be transient.

On the prosecution's rebuttal, department clerk Ralphs testified that a registrant who is moving and is going to become transient must note that information on a form. She also stated that registrants always receive a copy of their completed registration forms. The two other clerks who worked for the department testified they had not processed any paperwork for defendant regarding his move out of Rocklin.

We will provide additional background information as necessary.

DISCUSSION

I

Admission of Excessive and Inflammatory Evidence

Defendant claims he suffered a denial of due process when the trial court admitted excessive, inflammatory, or propensity evidence. He specifically targets: (1) the parole officers' testimony regarding their explaining the registration requirements to him, disclosing his parole status to the jury, and testifying that he absconded from parole; (2) the court's failure to sanitize a certification of registration prepared by the Department of Justice and admitted into evidence that disclosed his underlying sex conviction as possibly being an act against a minor; (3) the court's refusal to admit evidence that defendant's listing in a public data base as a child molester was error; and (4) the court's denial of his motion for a mistrial due to Dresser's statement while on the stand that he had received death threats after changing the locks at the

house. Defendant also claims these errors were cumulative. We review each contention.

A. *Parole officers' testimony*

Defendant claims the testimony of Officers Ward and Ertola was excessive, prejudicial, and improperly used to establish propensity. He asserts their testimony was not needed to show his knowledge of the registration requirements or that he left Rocklin, as those elements were established by the clerks from the Rocklin Police Department and his former roommates. Also, the officers' titles as parole officers and their official forms could have been sanitized. Using the federal parole violation to show he left Rocklin was, in his words, "prejudicial overkill."

To prove a violation of section 290, the prosecutor had to establish, among other points, that defendant actually knew he was required to register within five days of his move out of his Rocklin residence. (Former § 290, subd. (b).) Officer Ward's testimony that she informed him of his registration requirements was relevant to establishing this element. That the Rocklin Police Department clerk also gave defendant a form with the same information on it the following year did not render Officer Ward's testimony cumulative. Both witnesses' testimony was relevant to establishing actual knowledge.

The prosecutor also had to establish that defendant moved from Rocklin. Officer Ertola's testimony that defendant told him he left Rocklin with the intent not to return was relevant to establishing this element. Although this was an admission by

defendant of absconding from parole, it was not unduly prejudicial, as its probative value outweighed any prejudicial impact it may have had on the jury. As the trial court noted, if defendant absconded from parole, he could not argue that he did not change his address.

Defendant also faults this evidence because the prosecutor allegedly used it to argue propensity, i.e., that defendant's willingness to violate parole makes his assertion of complying with registration requirements unbelievable. We will address this argument below as one of prosecutorial misconduct.

B. *Sanitization of underlying sex offense evidence*

Defendant faults the trial court for refusing to sanitize the Department of Justice's certification of his registration history. The document listed defendant's sex offense as a violation of section "288a(c)," "oral copulation with person under 14/etc or by force/etc." Defendant claims the document unfairly suggested to the jury that his offense involved a child when in fact it did not. The crime was one of force against an adult, in violation of section 288a(c)(2).

The parties stipulated that the offense would be referred to only as a felony sex offense requiring registration. The prosecution also agreed to defendant's request to redact the conviction information on the registration form. The trial court, however, refused defendant's request. It admitted the form unredacted but subject to an instruction that the jury not consider the form's conviction and release information.

The court did not abuse its discretion in admitting the form in its original state. The court's instruction was adequate to remove the potential for undue prejudice. By following the admonition, the jurors would not have considered defendant's crime may have been against a child. We assume jurors follow admonitions given them. (*People v. Kegler* (1987) 197 Cal.App.3d 72, 80.)

C. *Evidence of defendant's listing as a child molester*

Officer Ertola testified that defendant told him he left the district on April 4 because he became upset over an incident that occurred with his coworkers at work. On cross-examination, defense counsel wanted to inquire about what had happened at defendant's work. Counsel asked Officer Ertola: "What upset [defendant] was given the fact that his prior sex offense involved a 30-year-old adult female, the Megan's Law listed [*sic*] him as a child molester caused him to be upset?" The prosecutor objected to the question due to the parties' stipulation about the nature of the predicate offense. The trial court sustained the objection.

Defendant argues the trial court erred when it sustained the objection. He claims Officer Ertola's answer to the question was admissible under Evidence Code section 356.[3] That

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[3] Evidence Code section 356 reads: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration,

statute makes admissible any other conversation which is necessary to make a detached conversation previously admitted into evidence understood. As the issue at trial was defendant's credibility, defendant asserts he was entitled to introduce the remainder of Officer Ertola's conversation with him in order to blunt the implication that he was a child molester, and to explain that he left town for substantial reasons and not due to criminal propensity.

Due to the court's sustaining of the objection, there was no implication to blunt. Officer Ertola said nothing that implied defendant was a child molester. The court did not err in sustaining the objection.

Assuming for purposes of argument only that the evidence should have been admitted, we would find defendant suffered no prejudice from the trial court's upholding the objection. Instead of hearing defendant's statements on this issue through Officer Ertola's testimony, the jury heard the same evidence directly from defendant when he testified, and it still found him guilty.

Defendant explained to the jury what caused him to leave the district. When he arrived at work in late March, his cubicle was plastered with posters of his listing on Megan's List as a child offender. His sex offense had originally been mislabeled as one against a child, when in fact it was not.

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conversation, or writing which is necessary to make it understood may also be given in evidence."

This and other factors led him to abscond. He explained all of these problems to Officer Ertola when he returned.

Thus, the jury heard the same evidence the court would not allow Officer Ertola to discuss, and it nonetheless convicted defendant. The court committed no prejudicial error by sustaining the objection to defendant's question to Officer Ertola.

D. *Denial of motion for mistrial*

Defendant argues the trial court erred when it denied his motion for a mistrial based on a statement defendant's former business partner and roommate, Jim Dresser, made during his testimony at trial. We disagree.

Prior to trial, the prosecutor stated he would not delve into details of a personal conflict between defendant and Dresser, and the trial court so ordered. During trial, the prosecutor asked Dresser if defendant at some point stopped living at the Aitkin Dairy Road residence. The dialog continued:

"A. Yes. I believe it was around the 15th of April.

"Q. And how do you know that he stopped living there?

"A. Because we changed the lock on the doors, and I tried to file a police report and eventually -- I started to get some death threats and I tried to --

"[DEFENSE COUNSEL]: Objection.

"THE COURT: Sustained.

"[THE PROSECUTOR]: I don't want to go into any of that. I am just trying to understand time lines.

"A. Right."

Minutes later and outside the jury's presence, defense counsel moved for a mistrial, claiming Dresser's reference to death threats implicated defendant and prejudiced the jury.

The trial court denied the motion but it offered to strike the testimony at defense counsel's request. Counsel refused. That discussion went as follows:

"THE COURT: Well, first of all, I don't know that [Dresser's testimony] was a clear inference that it was the responsibility of [defendant]. The testimony stands on its own. I didn't get that impression necessarily. The objection was made, which I sustained. There was no request to strike the answer. I can strike the answer later on if you wish to do so in front of the jury. [¶] From a tactical standpoint, I take it you wanted to simply object and I sustained the objection. If you want me to go back and tell the jury to forget that part of the testimony of Mr. Dresser which dealt with death threats, I will do that, but that is a tactical decision you have to make as to whether or not you want to emphasize it.

"[DEFENSE COUNSEL]: I am not going to punctuate it any more.

"THE COURT: I understand, and however it does appear that Mr. Dresser was acting on his own when he blurted out that statement. So -- but I find it not harmful. So I am going to deny the request for mistrial."

The court did not abuse its discretion in denying the motion for mistrial. It reasonably concluded Dresser's comment

did not cause incurable prejudice. The comment was not expressly referenced towards defendant. It is not clear the jury would have interpreted it as referencing defendant. The court sustained the objection, and it offered to strike the comment and to admonish the jury to disregard it. Defendant rejected that option. The trial court did not abuse its discretion in denying the motion under these circumstances.

E. *Cumulative effect of errors*

Because we find the court did not commit prejudicial error, there is no cumulative error from these evidentiary matters.

II

Prosecutorial Misconduct

Defendant claims the prosecutor committed misconduct in his closing argument. He asserts the prosecutor unlawfully argued that defendant's prior acts of absconding from parole and failing to register in Sacramento when he moved to Rocklin demonstrated that defendant failed to register when he left Rocklin. Defendant raised no objection to the prosecutor's argument at trial. His failure to object and seek an admonition forfeits his claim here. (*People v. Wash* (1993) 6 Cal.4th 215, 265.)

Even were we to consider the claim on its merits or as a claim of ineffective assistance of counsel, we would conclude the prosecutor did not commit misconduct and the defendant suffered no prejudice. It is clear from the record that the prosecutor was not arguing propensity. He was arguing credibility. He informed the jury to consider very carefully

defendant's credibility, because "it is the only evidence in this case that supports a finding of not guilty. It's the only evidence. It stands completely alone."

The prosecutor spent the rest of his argument talking about credibility. As part of that argument, the prosecutor stated the circumstantial evidence showed defendant was not being truthful in his testimony. Defendant had "a very strong motive to leave Rocklin, to get out of there," the prosecutor said. "Things were not going well. People were accusing him of being some kind of pervert. That's not my word, but his. People were accusing him and the business wasn't going well, and he takes off, despite the federal parole. Off he goes. Yet he wants us to believe that the 290 law is something that he holds sacred." The prosecutor did not argue in this statement that because defendant had violated parole, he therefore failed to register. Rather, the prosecutor argued the parole violation went to defendant's credibility. That argument is not misconduct.

The prosecutor made a similar argument regarding defendant's apparent failure to register with Sacramento upon his move to Rocklin. The prosecutor stated defendant's past was relevant to determining whether defendant was telling the truth in this trial. Emphasizing that point, the prosecutor asked rhetorically whether defendant, who claimed to follow section 290 rigorously, thought it more important to register in April when he left Rocklin than in March when he left Sacramento. Again, this point did not go to propensity. It challenged the credibility of defendant's claim that he registered in April

when he left Rocklin. The prosecutor did not commit misconduct in his closing argument.

III

Jury Instructions

Defendant raises three arguments against the trial court's jury instructions: (1) the instruction on the section 290 violation was overbroad and allowed the jury to convict on an uncharged violation; (2) the court erroneously omitted a unanimity instruction; and (3) the court erroneously gave a false statement instruction. We review, and reject, each claim.

A. *Overbroad instruction*

Defendant claims the court's instruction on the elements of section 290 presented the jury with an alternative theory to convict that had not been pleaded. Considering the instructions' entire charge, we conclude the instruction was not in error.

The trial court informed the jury that the People had to prove:

"1. The defendant was previously found to have committed a sex offense which requires registration;

"2. The defendant resided in the City of Rocklin, Placer County, California;

"3. a. That the defendant registered as a sex offender with the Police Chief of the City of Rocklin; and

"3. b. The defendant actually knew he had a duty to inform the Police Chief of the City of Rocklin that he was moving within 5 working days of the move;

"AND

"4. The defendant willfully failed to inform the Chief of Police of the Rocklin Police Department within five working days of changing his residence address *or transient location*. . . ." (Italics added.)

Defendant claims the alternative reference at the end of paragraph four to moving from a transient location allowed the jury to decide the case on grounds other than those charged. He testified at trial that he never registered again after leaving Rocklin.[4] He asserts that under the instruction, the jury could have found him guilty for failing to register while he was transient even if it concluded he had in fact registered with Rocklin upon his moving from the city.

"[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Burgener* (1986) 41 Cal.3d 505, 538, disapproved on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 750-751.) Moreover, we are to assume that jurors are intelligent and capable of understanding, correlating, and following all given jury instructions. (*People v. Kegler, supra,* 197 Cal.App.3d at p. 80.)

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[4] We note that although defendant was not charged with failing to register as a transient during the time he was transient, this statement by him constituted an admission of violating section 290. At a minimum, the jury could have considered this statement as going to his credibility on the charged offense.

Defendant's argument ignores the instruction's entire charge. The instruction centers on defendant residing in Rocklin and his requirement to register upon moving from his Rocklin residence. Because the prosecution had to prove that defendant resided in Rocklin, the jury could not convict under this instruction on evidence that defendant was transient, i.e., did not reside in any particular place.

Defendant's argument also misjudges the jurors' capacity to recognize this case hinged on defendant residing in Rocklin, and their ability to understand that the jury instruction was based solely on that contention. Not only this instruction, but the entire case rested on defendant having resided in, and moved from, Rocklin, and whether he notified Rocklin of his move from that city. (Former § 290, subd. (f)(1); Stats. 2004, ch. 761, § 1.3.) The jury would have interpreted this instruction correctly.

Most likely, the trial court was attempting to incorporate defendant's defense into the instruction. In light of his claim that he became transient upon leaving Rocklin, the court was requiring the prosecution to prove defendant failed to register upon becoming transient. In so doing, the trial court did not instruct on an uncharged theory, and it committed no error in giving the instruction.

B. *Unanimity instruction*

Next, defendant claims the court was required to give a unanimity instruction because it instructed on an alternate theory of the crime, as just discussed. Because we conclude the

court did not instruct on an alternate theory, the court was not required to give a unanimity instruction. The only question presented to the jury by the prosecutor's argument and the instructions was whether defendant registered with the Rocklin Police Department within five days of moving from his residence in Rocklin. No unanimity instruction is required where there is only one theory of guilt. (See *People v. Meyer* (2003) 108 Cal.App.4th 403, 418.)

C. *False statement instruction*

Defendant faults the court for giving the jury CALCRIM No. 362 regarding the evidentiary value of false statements made by the defendant. He claims the evidence of his giving a false name to police upon his arrest did not relate to the charged offense, but rather went only to the federal parole violation. His interpretation of the statement's meaning, however, is not the test for determining whether to give the instruction.

As given by the trial court, the instruction read: "If the defendant made a false or misleading statement relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

The trial court has a sua sponte duty to instruct on consciousness of guilt when there is evidence that the defendant

intentionally made a false statement from which such an inference could be drawn. (*People v. Atwood* (1963) 223 Cal.App.2d 316, 333-334, disapproved on another ground in *People v. Carter* (2003) 30 Cal.4th 1166, 1197-1198.)

Defendant admitted giving a false name to police when he was arrested in San Francisco. An inference of guilt could be drawn from that statement. He was avoiding being caught because he knew he had not registered. The court thus had a duty to instruct on the statement.

Defendant, however, testified he gave a false name because he had absconded from federal parole. He claimed he had no idea there was a state warrant issued for his failure to register because "I had notified them that I was going to be in transit."

Defendant's testimony does not eliminate the inference that defendant gave a false name also because he knew he had failed to register. Because defendant made a statement from which an inference of guilt could be drawn, the court had a duty to instruct sua sponte on the possible effect of defendant's false statement, no matter what defendant subjectively believed the statement meant. As the instruction states, it is for the jury to decide the false statement's meaning and importance. But because defendant made a false statement from which an inference of guilt of failing to register can be made, the trial court was mandated to give the instruction. It committed no error in doing so.

IV

Evidence Supporting Prior Serious Felony Convictions

As mentioned above, defendant at trial admitted three prior felony convictions: a 1978 Oregon conviction for robbery; a 1982 federal conviction for armed bank robbery, and a 1996 conviction in Humboldt County for forcible oral copulation in violation of section 288a. Defendant asserts insufficient evidence supports the jury's finding that each of these convictions constituted serious/violent felonies for purposes of the Three Strikes law. After reviewing the evidence supporting each strike conviction, we disagree.

A. *1996 California oral copulation conviction*

Defendant claims the evidence supporting his conviction for oral copulation by force, by definition a serious felony, does not eliminate the possibility he was convicted of oral copulation that was accomplished against the victim's will by threats of future retaliation, a former possible element of violating section 288a, subdivision (c), that is not considered to be a serious felony. (See *People v. Towers* (2007) 150 Cal.App.4th 1273, 1277.) He also claims it was not until 2006 that forcible oral copulation was deemed a "violent" or "serious" felony for purposes of Three Strikes. Defendant is wrong on both counts.

First, there is no doubt defendant was convicted of committing oral copulation with force. Although the original abstract of judgment stated he was convicted of violating

section 288a(c), "Oral Cop/under 14," the trial court later ordered the abstract corrected to show he was convicted of "Oral Copulation With Force, PC § 288a(c)(2)."

In addition, the court's minute order states defendant was convicted of oral copulation "w/person under 14 or w/force." Also, the information filed against defendant charged him with one count of oral copulation with force, in violation of section 288a(c). This is ample evidence to support the jury's strike finding on the 1996 oral copulation conviction.

Second, defendant is mistaken when he states oral copulation with force was not a serious felony until 2006. Oral copulation with force was listed as a "violent felony" under section 667.5, subdivision (c)(5), and as a "serious felony" under section 1192.7, subdivision (c)(5), as early as 1976. (*People v. Nava* (1996) 47 Cal.App.4th 1732, 1735-1736, fn. 4; § 667.5, subd. (c)(5); Stats. 1976, ch. 1139, § 268, p. 5138; § 1192.7, subd. (c)(5), added by Initiative Measure (Prop. 8, § 7, approved June 8, 1982).)

B. *1982 federal armed bank robbery conviction*

Defendant contends insufficient evidence supports the jury's determination that his 1982 federal armed bank robbery conviction constituted a serious felony. We disagree.

Defendant in 1982 pleaded guilty to armed bank robbery. At the time he entered his plea, he admitted being armed when he robbed the bank. Specifically, the court asked him: "Part of the charge is that the bank robbery was an armed robbery. Will you tell me about that; was it armed?

"[DEFENDANT]: I was holding a model 66 357 caliber pistol.

"THE COURT: You were?

"[DEFENDANT]: Yes."

This evidence supports the jury's determination that defendant committed a robbery and was personally armed, both strikes under California law. (§§ 667.5, subd. (c)(8), (9); 1192.7, subd. (c)(8), (19).)

C. *1978 Oregon robbery conviction*

Defendant claims insufficient evidence supports the jury's determination that his 1978 robbery conviction in Oregon constituted a California strike. He asserts his guilty plea to the indictment does not establish that he personally used a weapon to commit the crime, or that the crime was not performed by an accomplice. We conclude the evidence is sufficient to support a finding of a serious felony.

Defendant in 1978 pleaded guilty in Oregon to the following acts, as charged by the indictment: that he, "acting together with Grant Edward Conklin, did unlawfully and knowingly threaten the immediate use of physical force upon Richard Remington Miller by holding a knife to Richard Remington Miller's throat, and was armed with a dangerous weapon, to-wit: a knife, while in the course of committing theft of property, to-wit: 1956 Chevrolet pickup truck and United States currency, with the intent of preventing resistance to the said defendants' taking of the said property . . . ."

Although the language indicates defendant did not act alone, it clearly indicates defendant was party to what is

defined as a robbery under California law, "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211) Moreover, the indictment specifically alleges it was defendant who was armed with a knife and held it against the victim's throat at the time of the robbery. Such acts constitute serious and violent felonies for purposes of California's Three Strikes law. (§§ 667.5, subd. (c)(9); 1192.7, subd. (c)(19).) This is sufficient evidence to support the determination that defendant committed what is the equivalent of a robbery under California law, and thus a serious felony for purposes of Three Strikes.

V

Evidence Supporting Prior Prison Term Determinations

Defendant claims the evidence supporting the two foreign prison term determinations is inadequate as it failed to prove defendant actually served one year in prison for each conviction, a requirement for imposing the enhancement based on foreign prison terms. (§ 667.5, subd. (f).) We conclude there is substantial evidence to support the determinations.

At the enhancement allegations trial, the trial court relied on the certified court documents provided by the prosecutor and on defendant's testimony from his trial on the merits. Regarding the Oregon conviction, defendant admitted at trial that he was convicted in Oregon of robbery. The certified documents confirmed defendant's testimony. Also, evidence from the federal armed bank robbery action recorded that defendant

there stated he had served his sentence for the Oregon crime in an Oregon penitentiary for three years. This is sufficient evidence to support the trial court's determination that defendant served at least one year in prison for the Oregon conviction.

Regarding the 1982 federal armed bank robbery conviction, defendant admitted at trial that he was convicted of this crime. He was sentenced to 25 years in prison. On recross-examination, he testified that "in '93 I got out. Then I got back into the federal system for a parole violation. Then I got out in 94." Officer Ward testified she oversaw defendant on parole in 1994.

A release from parole supports an inference that defendant's period of incarceration had been completed before his parole period began. (*People v. Crockett* (1990) 222 Cal.App.3d 258, 263-266.) Defendant's statement that he got out in 1993 suggests he served at least 11 years in prison for the armed bank robbery. His violation of parole implies he had been placed on parole in 1993, which in turn suggests his period of incarceration was completed in 1993. This is sufficient evidence on which the trial court could conclude defendant served at least one year in prison for his federal armed bank robbery conviction.

Defendant asserts we cannot rely on his admissions at trial because doing so amounts to relitigating the priors, or it forces us to rely on "unduly unreliable evidence" to support the facts. We disagree with his claim. "The testimony [concerning the priors] was given during the trial of the underlying charge.

[Defendant] cites no authority to support his claim that evidence from the trial on the underlying offense cannot be considered at the trial on the subsequent enhancement allegations. To preclude the court from considering evidence properly before it during another part of the trial would be unnecessarily rigid and would hamper, rather than further, the interests of justice." (*People v. Elmore* (1990) 225 Cal.App.3d 953, 957.)

VI

Refusal to Submit Prior Conviction and Prior Prison Term Issues to the Jury

Defendant contends the trial court denied him his federal constitutional right to a jury trial on the prior serious felony conviction findings and the prior prison term findings. We disagree.

Trial on the prior conviction issues was bifurcated. Regarding the prior serious conviction allegations, the jury received documentary evidence on defendant's three prior convictions, along with instructions to decide whether the evidence proved defendant had been convicted of the alleged crimes. The jury found the allegations were true.

As to the prior prison term allegations, however, the trial court determined that no issues regarding those allegations had to be submitted to the jury. At sentencing, it found the prior prison term allegations were true.

Defendant asserts he had a federal constitutional right under *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d

856] (*Cunningham*) to have all of the issues regarding the prior conviction allegations, including the determination of whether the prior convictions constituted serious felonies for purposes of the Three Strikes Law, and prior prison terms determined by the jury.

This court has already rejected that argument with regards to prior conviction allegations. (*People v. Jefferson* (2007) 154 Cal.App.4th 1381, 1386-1389 (*Jefferson*).) We repeat our holding in that case here:

"In *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*) the United States Supreme Court held, recognizing its prior decision in *Almendarez-Torres v. United State*s (1998) 523 U.S. 224 [140 L.Ed.2d 350] (*Almendarez-Torres*) that: 'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' (*Apprendi, supra*, 530 U.S. at p. 490 [147 L.Ed.2d at p. 455].)

"In [*People v. McGee* (2006) 38 Cal.4th 682 (*McGee*)], the California Supreme Court considered whether *Apprendi* compelled the conclusion that a criminal defendant has a right under the federal Constitution to have a jury examine the record of a prior criminal proceeding to determine whether the nature of the earlier conviction subjects the defendant to an increased sentence under the applicable sentencing statutes. (*Id.* at pp. 685-686.) The Supreme Court reviewed a number of its prior decisions (id. at pp. 692-695, 699-700), reviewed *Apprendi* (*id.*

at pp. 695-699), recognized numerous cases have interpreted the *Almendarez-Torres* exception for recidivism as not being 'limited simply to the bare fact of a defendant's prior conviction, but extend[ing] as well to the nature of that conviction' (*id.* at p. 704, italics omitted), and observed that under California law, the inquiry involved in determining the nature of a prior conviction 'is a limited one [that] must be based upon the record of the prior criminal proceeding.' (*Id.* at p. 706.) Based on the 'significant difference between the nature of the inquiry and the factfinding involved in the type of sentence enhancements at issue in *Apprendi* and its progeny as compared to the nature of the inquiry involved in examining the record of a prior conviction to determine whether that conviction constitutes a qualifying prior conviction for purposes of a recidivist sentencing statute,' the California Supreme Court concluded there was no federal constitutional right to a jury trial as to whether a prior conviction qualified as a serious felony under California law. (*Id.* at p. 709.) The court stated 'the examination of court records pertaining to a defendant's prior conviction to determine the nature or basis of the conviction' was 'a task to which *Apprendi* did not speak and "the type of inquiry that judges traditionally perform as part of the sentencing function."' (*Ibid.*, italics omitted.)

"In *Blakely* [*v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403], the United States Supreme Court reiterated its holding in *Apprendi, supra*, 530 U.S. 466, 490, that, '"[o]ther than the fact of a prior conviction, any fact that increases the penalty

for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."' (*Blakely v. Washington, supra*, 542 U.S. at p. 301 [159 L.Ed.2d at p. 412].) In *Cunningham, supra*, 549 U.S. 270 [166 L.Ed.2d 856], the United States Supreme Court repeated again: 'Except for a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."' (*Cunningham, supra*, at p. ___ [166 L.Ed.2d at p. 873].) Thus, the United States Supreme Court continues to recognize the *Almendarez-Torres* exception for recidivism. As the California Supreme Court's analysis in *McGee, supra*, 38 Cal.4th 682, rested largely on such exception, we believe it remains good authority even after *Blakely* and *Cunningham*." (*Jefferson, supra*, 154 Cal.App.4th at pp. 1386-1389.)

Regarding the prior prison term findings, there was no constitutional right to a jury trial on a section 667.5 allegation under pre-*Cunningham* law. In *People v. Thomas* (2001) 91 Cal.App.4th 212 (*Thomas*), the Court of Appeal determined the *Almendarez-Torres* jury trial exception for prior convictions referred broadly to recidivism enhancements, and specifically to prior prison term allegations under section 667.5. (*Thomas, supra,* at pp. 222-223.)

Similarly, in *People v. Belmares* (2003) 106 Cal.App.4th 19, the Court of Appeal determined a defendant did not have a constitutional right to a jury trial on the issue of whether he was the person whose name appeared on the section 696b packet

admitted into evidence to show he had served prior prison terms for purposes of section 667.5. It held the right to a jury trial on prior conviction allegations derives from state statute, not the federal Constitution. (*Id.* at p. 27.)

As we found in *Jefferson*, *Cunningham* did not overrule the *Almendarez-Torres* exception. Nothing in *Cunningham* limits the prior conviction exception to the narrow finding of the existence of a prior conviction. And, since *Cunningham*, the California Supreme Court has cited *Thomas* with approval to emphasize the prior conviction exception is to be read broadly to include allegations based on recidivism. (See *People v. Towne* (2008) 44 Cal.4th 63, 79-81; *People v. Black* (2007) 41 Cal.4th 799, 819.)

For these reasons, *Thomas* remains good authority after *Cunningham*. Accordingly, defendant did not have a federal constitutional right to have the section 667.5 allegations heard by a jury.

However, defendant continues to have a limited statutory right to a jury trial on section 667.5 allegations under sections 1025 and 1158. (*People v. Winslow* (1995) 40 Cal.App.4th 680, 687.) The trial court did not recognize and enforce that right here. A trial court's failure to provide a jury trial for section 667.5 allegations in violation of section 1025 is subject to harmless error analysis under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Epps* (2001) 25 Cal.4th 19, 29.)

Applying the *Watson* test, we conclude it is not reasonably probable that a result more favorable to defendant would have been reached if a jury, instead of the court, had determined that defendant served two prior prison terms in foreign jurisdictions lasting at least one year. The evidence is indisputable that defendant served prison terms of more than one year for both the Oregon robbery conviction and the federal armed bank robbery conviction. A jury thus would not have reached a different conclusion.

VII

Cumulative Error

Defendant asserts the alleged errors just discussed constitute prejudicial cumulative error. Our discussion rejecting all of defendant's claims but one and finding on that one no prejudicial error demonstrates there was no cumulative error.

VIII

Denial of Motion to Strike Prior Strikes

Defendant claims the trial court abused its discretion when it denied his *Romero*[5] motion to strike one of his prior serious felony convictions. He asserts his situation places him outside the spirit of the Three Strikes law. We conclude the court did not abuse its discretion.

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[5] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

Deciding defendant's motion, the trial court was required to "consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

"In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, '"[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review."' [Citations.] Second, a '"decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'"' [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377 (*Carmony I*).)

The court's decision here is not so irrational or arbitrary. After reviewing defendant's motion, his probation

report, and the prosecution's statement in aggravation, the court denied the motion due to the lack of evidence showing defendant had sufficiently changed his lifestyle and due to the nature of his current crime. The court explained: "I look at a *Romero* motion as being akin to judicial clemency. And the Court understands that it has discretion in this case, but in order for there to be an exercise of discretion, I view the issue as one that neither the defendant has shown a material departure from a previous lifestyle indicating a turnaround in his outlook towards his role in society and as being an arrest-free, conviction-free person, and that's demonstrated by a moment of period of time that we would be assured that he's going to remain crime-free save except the existing crime.

"And secondly, the existing crime is one we can also take into consideration, the facts surrounding the existing crime, and in this particular case this is a fairly aggravated case of a 290, in my opinion. It is not a technical violation. It is a deliberate violation, and one in which I don't find the criteria necessary to seriously consider the fact of the crime as leading toward the granting of judicial clemency and so having weighed all those factors and applying them up against the grid of the guided discretion that the Court has, the Court will now confirm its ruling that the *Romero* motion is denied."

The record shows the trial court considered whether defendant was outside the spirit of Three Strikes in light of the nature and circumstances of the present felony, his prior serious felony convictions, and his background, character, and

prospects. Having reviewed the same information, we conclude the court did not reach its conclusion arbitrarily or irrationally.

IX

Cruel and Unusual Punishment

Defendant contends his indeterminate life sentence for failing to register within five days of moving from Rocklin violates federal and state constitutional prohibitions against cruel and/or unusual punishment. We disagree.

Our court has seen both sides of this issue. In *People v. Carmony* (2005) 127 Cal.App.4th 1066 (*Carmony II*), we determined a 25-year-to-life sentence imposed on a registered sex offender for failing to register within five days of his birthday was unconstitutional. However, in *People v. Meeks* (2004) 123 Cal.App.4th 695 (*Meeks*), we determined a 25-year-to-life sentence imposed on a registered sex offender for failing to register within five days of changing his address was *not* unconstitutional.

In both cases, we sought to determine under federal law whether "an inference of gross disproportionality" (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1005 [115 L.Ed.2d 836, 871] (conc. opn. of Kennedy, J.) could be made by weighing the crime and defendant's sentence "in light of the harm caused or threatened to the victim or to society, and the culpability of the offender." (*Solem v. Helm* (1983) 463 U.S. 277, 292 [77 L.Ed.2d 637, 651].)

Similarly, we sought to determine under state law whether the sentence was so disproportionate to the crime that it "shocks the conscience" in light of the defendant's history and the seriousness of his offenses. (*In re Lynch* (1972) 8 Cal.3d 410, 424.)

In *Carmony II*, we determined an inference of gross disproportionality existed. "While a violation of section 290 is classified as a felony," we wrote, "the instant offense was a passive, nonviolent, regulatory offense that posed no direct or immediate danger to society. Defendant committed this offense by violating the annual registration requirement (former § 290, subd. (a)(1)(C)), having correctly registered the proper information the month before. Obviously, no change had occurred in the intervening period and defendant's parole agent was aware of this fact. Thus, because defendant did not evade or intend to evade law enforcement officers, his offense was the most technical and harmless violation of the registration law we have seen." (*Carmony II, supra*, 127 Cal.App.4th at p. 1078.)

"Although this requirement [to register annually] serves a legitimate purpose," we continued, "it is nevertheless a backup measure to ensure that authorities have current accurate information. In this case, when defendant failed to register within five days of his birthday, he was still on parole, had recently updated his registration, had not moved or changed any other required registration information during the one month since he registered, and was in contact with his parole officer. Therefore, his failure to register was completely harmless and

no worse than a breach of an overtime parking ordinance. [Citation.]" (*Carmony II, supra*, 127 Cal.App.4th at p. 1079.)

In light of these circumstances, and the fact that the defendant's three strike offenses were remote in time and nature, we concluded the indeterminate life sentence was grossly disproportionate to the gravity of the offense. (*Carmony II, supra*, 127 Cal.App.4th at p. 1081.)

By comparison, in *Meeks*, we determined an inference of gross disproportionality did not exist. In that case, the defendant, over the course of more than two years, had moved three times and lived for a period of time on the street without ever registering his new addresses or his transient status. (*Meeks, supra,* 123 Cal.App.4th at pp. 700-701.)

We concluded the indeterminate life sentence for his offense was no more disproportionate than the indeterminate life sentence upheld in *Ewing v. California* (2003) 538 U.S. 11 [155 L.Ed.2d 108], for a third strike of grand theft for shoplifting three golf clubs. "[Defendant] has violated a law that is intended to avoid, or at least minimize, the danger to public safety posed by those who have been convicted of certain sexual offenses. It is at least as serious as theft of three golf clubs." (*Meeks, supra*, 123 Cal.App.4th at p. 708.)

The *Carmony II* court distinguished the seriousness of the registration offense before it with the one before the *Meeks* court. The *Carmony II* court noted "the offense committed by Meeks was not the technical violation committed by defendant. Meeks failed to register after changing his residence and

therefore, unlike in the present case, law enforcement authorities did not have Meek's correct address and information." (*Carmony II, supra*, 127 Cal.App.4th at p. 1082, fn. 11.; see also *Gonzalez v. Duncan* (9th Cir. 2008) 551 F.3d 875, 885 (*Gonzalez*) ["California courts have recognized that the distinction between a conviction for failure to register after a change of address . . . and a conviction for failure to update registration annually . . . is critical," citing *Meeks* and *Carmony II*.)

It is this distinction that supports the sentence given in this case. Unlike in *Carmony II*, defendant's failure to register thwarted the fundamental purpose of the registration law, thereby leaving the public at risk. "The purpose of the sex offender registration law is to require that the offender identify his present address to law enforcement authorities so that he or she is readily available for police surveillance." (*Carmony II, supra*, 127 Cal.App.4th at p. 1072.)

The registration law's "mandate that sex offenders register any change of address relates directly to the state's interest in ensuring that it knows the whereabouts of its sex offenders. As noted by the California Supreme Court, '[e]nsuring offenders are readily available for police surveillance depends on timely change-of-address notification.' ([*Wright v. Superior Court* (1997) 15 Cal.4th 521, 527] (internal quotation marks and citation omitted).)" (*Gonzalez, supra*, 551 F.3d at p. 884.)

Here, for a period of over eight months, defendant's whereabouts were unknown. Even his federal parole officer did

not know where he was. He was drifting around the country and "hiding out with the hippies." That is hardly a condition of being readily available for police surveillance. Such blatant disregard of the registration act and complete undercutting of the act's purposes is a serious offense.

Defendant's failure to register when he left Rocklin and his thwarting the purpose of the registration act of being able to be located, coupled with the seriousness of his prior convictions and his sustained criminality, all demonstrate his sentence was not grossly disproportionate to his offense. Under these circumstances, his sentence does not shock the conscience. The sentence thus does not constitute cruel and/or unusual punishment under the federal or California Constitutions.

X

Abstract of Judgment

Defendant requests we order the abstract of judgment be corrected to state the three one-year enhancements were imposed pursuant to section 667.5, not "667(B)-(I)," as it currently states. We will so order.

DISPOSITION

The judgment is affirmed. The clerk of the superior court is ordered to correct the abstract of judgment to state the three one-year enhancements were imposed pursuant to Penal Code section 667.5, and to forward the corrected abstract to the Department of Corrections and Rehabilitation.

NICHOLSON, J.

We concur:

BLEASE, Acting P. J.

SIMS, J.