

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

C054142

Plaintiff and Respondent,

(Super. Ct. No.
05F08989)

v.

JUAN MICHAEL TIDWELL,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Sacramento County, Maryanne G. Gilliard, J. Affirmed as modified.

Kat Kozik, 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, Julie A. Hokans, Supervising Deputy Attorney General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts II through IX.

Convicted of rape and other crimes for his attack on a deaf woman, defendant was sentenced to state prison for 150 years to life plus one year. On appeal, defendant makes assertions of evidentiary error, instructional error, ineffective assistance of trial counsel, and sentencing error. We conclude that judgment must be modified by striking some of the jury's true findings. As modified, we affirm. We also order the trial court to amend its minute order from sentencing and the abstract of judgment.

In the published portion of this opinion, we consider whether the procedure required by Evidence Code section 782 for admitting evidence of a victim's prior sexual conduct to attack the victim's credibility applies when the defense attempts to introduce evidence that the victim made prior false complaints of rape. We hold that Evidence Code section 782 does not apply in such circumstances.

FACTS

The victim, R.C., a deaf woman with a learning disability, was 21 years old when the attack took place on September 10, 2005. She communicates by sign language, reading lips, writing notes, and text messaging. She lived in the vicinity of the College Greens light rail station in Sacramento and worked the night shift at Wal-Mart.

On September 10, 2005, R.C. left her apartment at 9:30 p.m. to go to work, walking toward the light rail station. As she was walking, defendant approached her and asked if he could use her cell phone. R.C. let him use the phone and, after he was

finished, he gave it back. R.C. continued on her way toward the light rail station, and defendant accompanied her. They communicated by writing notes in a notebook.

Defendant asked R.C. to go out with him, but she said she could not. She told him that she already had a boyfriend and that she worked at Wal-Mart and was going to the light rail station on her way to work. Defendant offered to give R.C. a ride to work, but she declined. He also offered to pay her to spend some time with him, which she also declined.

R.C. walked across the street to the light rail station, thinking she was leaving defendant behind. As she went to purchase her ticket for the train, however, defendant walked up behind her and tapped her on the shoulder. He wrote her a note telling her he had a gun and directing her to come with him. He wrote that he wanted money, and she responded that she could not give him any. Defendant persisted in telling her to give him her money.

Defendant took R.C. to a dark area of a parking lot by the light rail station. R.C. saw that defendant had a knife in his hand. Only the blade was visible. She described it as a stabbing knife with a sharp point. Defendant asked R.C. for \$200. She had just \$20, which she gave to him. Using written notes, defendant directed R.C. to pull up her shirt, "then I will leave." R.C. pulled up her shirt. He then had her pull down her pants and bend over towards the ground, which she did. She wrote to defendant asking if she could catch her train because she had shown defendant what he wanted to see. He

replied that he had not seen it. He wrote to her to do it again, "then you can leave." Defendant put his jacket on the ground and told R.C. to lie down on it. He touched her vagina, putting his finger inside, and kissed her breasts. Defendant had R.C. get on her knees. He put on a condom and raped R.C., inserting his penis into her vagina several times.

When defendant was finished, he allowed R.C. to put her clothing back on. They walked over to the light rail station, but there were no more trains coming because it was midnight. Defendant was trying to act nicely. He asked R.C. if she wanted to go out for dinner. She responded that she had already eaten. Defendant offered to take her home or to work. She accepted a ride to work because she did not want him to know where she lived.

Defendant drove R.C. to the Wal-Mart where she worked. R.C. went into Wal-Mart, and defendant drove away. Upset and shaking, she immediately reported that she had been raped. She was taken to a hospital, where a rape examination was performed. Fissures were found in R.C.'s vagina, consistent with rape. Later, she met with police officers and turned over the notes that had been exchanged between her and defendant.

Defendant was arrested one month after the rape. He claimed he did not recall having sex with a deaf woman and did not recognize her picture. He denied owning a jacket.

The parties stipulated that defendant's DNA was found on the inside crotch area of R.C.'s underwear and on her breast. Defendant's fingerprints were on the notebook pages that R.C.

gave to officers and that his handwriting was on some of those pages.

At trial, the defense was that R.C. consented to the sex acts defendant committed on her. There was evidence that defendant was flirting with R.C. during their interactions before R.C. reached the light rail station. R.C. never told defendant she did not want to have sex, and during his acts, when he wrote the question, "Do you like it yes or no." She circled yes. She accepted a ride to work from defendant and did not get out of defendant's car immediately upon arriving in the Wal-Mart parking lot. Before getting out of the car, she agreed with defendant that she would call or text him.

PROCEDURE

A jury convicted defendant of six counts as follows:

- count one, kidnapping to commit rape and robbery (Pen. Code, § 209, subd. (b)(1)), with a finding that defendant was personally armed with a knife (Pen. Code, § 12022, subd. (b)(1));
- count two, sexual battery (Pen. Code, § 243.4, subd. (a));
- count three, sexual penetration with a foreign object (Pen. Code, § 289, subd. (a)(1)), with findings that he used a deadly weapon (Pen. Code, § 667.61, subd. (e)(4)), he kidnapped the victim thereby increasing the risk (Pen. Code, § 667.61, subd. (d)(2)), and he kidnapped the victim (Pen. Code, § 667.61, subd. (e)(1));
- count four, rape (Pen. Code, § 261, subd. (a)(2)), with findings that he used a deadly weapon (Pen. Code, § 667.61,

- subd. (e)(4)), he kidnapped the victim thereby increasing the risk (Pen. Code, § 667.61, subd. (d)(2)), and he kidnapped the victim (Pen. Code, § 667.61, subd. (e)(1));
- count five, rape (Pen. Code, § 261, subd. (a)(2)), with findings that he used a deadly weapon (Pen. Code, § 667.61, subd. (e)(4)), he kidnapped the victim thereby increasing the risk (Pen. Code, § 667.61, subd. (d)(2)), and he kidnapped the victim (Pen. Code, § 667.61, subd. (e)(1)); and
 - count nine, robbery (Pen. Code, § 211), with a finding that defendant was personally armed with a knife (Pen. Code, § 12022, subd. (b)(1)).

The jury acquitted defendant of three counts of rape -- counts six, seven, and eight.

The trial court found true that defendant had five prior convictions for serious felonies, all in 1998. The prior convictions were for two counts of robbery, two counts of kidnapping, and one count of assault with intent to commit rape.

The trial court sentenced defendant under the "Three Strikes" law as follows:

- 25 years to life, tripled to 75 years to life, for count three;
- three consecutive terms of 25 years to life for counts four, five, and nine;
- a consecutive term of one year for the use allegation in count nine;
- a concurrent term of 25 years to life for count two.

The trial court stayed the sentence for count one and its use allegation. Thus, the total state prison term imposed was an indeterminate term of 150 years to life and a determinate term of one year.

DISCUSSION

I

Prior Rape Allegations

Defendant contends that the trial court abused its discretion by excluding evidence that R.C. made prior rape complaints that may have been false. He asserts that the court erred by not allowing him to question R.C. pursuant to Evidence Code section 782 (hereafter, section 782). We hold that section 782 does not apply to prior rape complaints. And we conclude that the trial court did not abuse its discretion in excluding the evidence.

A. *Background*

Before trial, defendant filed a "Motion in Limine to Admit Evidence Pursuant to Evidence Code § 782." In connection with the motion, he made an offer of proof, detailed below, that R.C. had made prior false complaints of rape and sought a ruling from the court allowing him to introduce evidence of the prior complaints during the trial.

The offer of proof related to two incidents in which R.C. stated she had been raped: one on February 3, 2000, and the other on September 20, 2000.

1. February 3, 2000, Rape Complaint

According to defendant's offer of proof, R.C. told a police officer that she was blindfolded and kidnapped from in front of her apartments after school. The person, whom she did not know, tied her hands behind her back and transported her somewhere by car. He stopped the car, took her out of the car, and raped her. She told the officer that she was not sexually active. The person took her back to her apartments and left her there. She did not know the location of the rape. Although she did not tell her mother or brother what happened, she told two friends at school the next day, after which a police officer took her statement.

During a sexual assault exam on February 4, R.C. told the medical personnel that no force was used but that her vagina hurt. Although there was some vaginal discharge, there were no acute injuries. There was evidence of healed hymenal trauma, indicating prior penetration.

A few weeks after the February 3 incident, a police officer took a statement from Sonia Mejia, a friend of R.C. She stated that she talked to R.C. on the day after the incident. R.C. told her that R.C. had gone to her boyfriend's house. Her boyfriend was not there, but one of his friends, a 20-year-old, "touched" her. Mejia did not believe it was a stranger who attacked R.C.

2. September 20, 2000, Rape Complaint

On September 20, 2000, R.C. was a student at the California School for the Deaf in Fremont. She went to a grocery store

with other students and, while there, saw Mark Crawford, whom she had met at school. She went for a drive with Crawford and went with him into a public restroom at a park where he forced her to have sex with him.

A counselor questioned R.C. about leaving the store with Crawford. R.C. admitted she had gone for a drive with Crawford but denied that anything occurred between them. Months later, however, after the counselor received information that Crawford may have raped R.C., she asked R.C. about it. At that point, R.C. told the counselor that Crawford had raped her in the restroom.

R.C. told a police officer that Crawford pulled her from the store, took her forcibly by car, and raped her in the public restroom. She stated that she reported the rape to two counselors at the school and obtained an abortion pill from the nurse on campus. A social worker reported to an officer that she checked the records of the school's health center and determined that R.C. had come in because of vomiting that day but not because of a rape complaint.

Several months later, R.C. told an officer that she voluntarily walked to Crawford's car. When she hesitated, Crawford demanded that she get in. Although she was scared, she got in the car. She told the officer that Crawford later pulled her out of the car, pulled and pushed her towards the restroom at the park, and assaulted her.

Crawford was arrested, but he claimed that the encounter with R.C. was consensual. He was not prosecuted.

3. Exclusion of Evidence

After reviewing defendant's motion, the trial court stated its understanding that, because R.C. never recanted her prior rape complaints, the only way defendant could establish the falsity of the complaints would be to have the men she accused testify. Defense counsel agreed but noted that there were problems with that approach because R.C. was unable to identify an attacker for the February 2000 incident and Crawford, the person involved in the September 2000 incident, might be difficult to find. The trial court agreed to schedule a hearing out of the presence of the jury for the defense to present evidence in an attempt to establish the falsity of R.C.'s prior rape complaints.

At the hearing out of the presence of the jury, the defense, which had found Crawford, secured his presence in court to testify. But Crawford asserted his right to remain silent, making him unavailable as a witness. After the court and counsel discussed other alternatives for introducing evidence of R.C.'s prior rape complaints, including through counselors, police officers, and others, defendant moved for permission to introduce that type of evidence. The trial court ruled the evidence inadmissible pursuant to Evidence Code section 352 (hereafter, section 352). In making this ruling, the court commented on (1) the weakness of the evidence supporting a conclusion that the rape complaints were false and (2) the prosecution's intention to call a witness who would testify that

Crawford raped her around the same time that the incident took place with R.C.

B. *Applicability of Section 782*

Section 782 provides a procedure by which a defendant may attempt to attack the credibility of a complaining witness by introducing evidence of the complaining witness's sexual conduct. Although defendant attempted to utilize the procedure provided in section 782 to introduce evidence of R.C.'s allegedly false complaints of rape, the procedure was inapplicable because the evidence that defendant sought to introduce was of complaints of rape, not of sexual conduct.

Before a defendant may introduce evidence "of sexual conduct of the complaining witness . . . to attack the credibility of the complaining witness," the defendant must obtain the approval of the trial court by filing a motion and affidavit with an offer of proof, after which the trial court may be required to hold a hearing out of the presence of the jury to "allow the questioning of the complaining witness regarding the offer of proof made by the defendant." (§ 782, subd. (a).)¹

¹ In relevant part, section 782, subdivision (a) states:

"In any of the circumstances described in subdivision (c), if evidence of sexual conduct of the complaining witness is offered to attack the credibility of the complaining witness under Section 780, the following procedure shall be followed:

"(1) A written motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of

Citing section 782, defendant filed his motion to introduce evidence of R.C.'s prior complaints of rape. He claims his offer of proof was sufficient and thus required the trial court to allow him to question R.C. in a hearing out of the presence of the jury. Had he been able to do so, he speculates, she may have recanted her prior complaints of rape, which defendant could have used to impeach her in testimony in the presence of the jury.

As support for his claim that section 782 required the trial court to allow defendant to question R.C. in the hearing out of the presence of the jury, defendant cites authority for interpreting broadly the term "sexual conduct" in section 782.

proof of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness.

"(2) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated. The affidavit shall be filed under seal and only unsealed by the court to determine if the offer of proof is sufficient to order a hearing pursuant to paragraph (3). After that determination, the affidavit shall be resealed by the court.

"(3) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant.

"(4) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant pursuant to Section 780, and is not inadmissible pursuant to Section 352, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court."

For example, in *People v. Casas* (1986) 181 Cal.App.3d 889 (*Casas*), the court applied section 782 to a complaining witness's prior solicitation of an act of prostitution. The court reasoned that the prior act "reflect[ed] the speaker's willingness to engage in sexual intercourse" and therefore fell within a broad interpretation of the statute. (*Casas, supra*, at p. 895.) In *People v. Daggett* (1990) 225 Cal.App.3d 751, the court held that section 782 was applicable when the defense attempted to introduce evidence that a young victim of a sexual offense had been molested on an earlier occasion. The earlier molest was relevant to the child's ability to describe sexual acts such as those for which the current defendant was being prosecuted. (*Daggett, supra*, at p. 757.)

Generally, evidence of prior sexual conduct goes to the question of the victim's credibility concerning lack of consent, as discussed in *People v. Rioz* (1984) 161 Cal.App.3d 905 at page 916: "There is necessarily a certain amount of overlap between the issues of the victim's consent in a rape or other sex offense case and the victim's credibility. Presumably, any complaining witness in a rape case will deny consent to the sexual acts complained of; to avoid the harassment which had traditionally plagued complaining witnesses in cases of this type, the Legislature excluded evidence of prior sexual activity by the complaining witness with persons other than the defendant in order to prove consent. Thus, it seems clear under Evidence Code section 1103, subdivision (b)(1), that a defendant in a rape case cannot, based solely upon the victim's testimony and

her presumed denial of consent, introduce evidence that she engaged in sexual activity with 1 other man, 10 other men, or 100 other men, nor that she engaged in such activity freely or for monetary compensation. This rule properly prevents the victim of sexual assault from being herself placed on trial. However, once the defendant, in accordance with the procedural requirements of Evidence Code section 782, makes a sworn offer of proof concerning the relevance of the sexual conduct of the complaining witness to attack her credibility, even though it is the underlying issue of consent which is being challenged, then the absolute protection afforded by Evidence Code section 1103, subdivision (b)(1), gives way to the detailed procedural safeguards inherent in Evidence Code section 782." (Italics omitted.)

Even though the term "sexual conduct" in section 782 is interpreted broadly, it does not encompass the conduct attributed to the complaining witness here. Defendant sought to impeach R.C. with allegedly false statements, not sexual conduct or, as in *Casas*, a willingness to engage in sexual conduct. In *People v. Franklin* (1994) 25 Cal.App.4th 328, the court made the distinction between the attempt to impeach with prior sexual conduct and to impeach with prior false complaints of rape or molest. It stated: "Even though the content of the statement [the false complaint] has to do with sexual conduct, the sexual conduct is not the fact from which the jury is asked to draw an inference about the witness's credibility. The jury is asked to draw an inference about the witness's credibility from the fact

that she stated as true something that was false. The fact that a witness stated something that is not true as true is relevant on the witness's credibility whether she fabricated the incident or fantasized it." (*Id.* at p. 335.)

Section 782 was inapplicable because it was R.C.'s allegedly false complaints that the defense sought to use as impeachment evidence, not her prior sexual conduct or willingness to engage in sexual activity. Under these circumstances, the language of section 782 does not apply and the procedure mandated by section 782 is unnecessary. Accordingly, defendant fails in his assertion that, pursuant to section 782, the trial court was required to allow him to question R.C. in a hearing out of the presence of the jury to determine whether she would recant her prior complaints of rape.

C. *Exclusion under Section 352*

Although the trial court was not required to hold a hearing pursuant to section 782, we must still consider defendant's assertion that the trial court erred in excluding, pursuant to section 352, evidence of R.C.'s allegedly false complaints of rape. We conclude that, even though the evidence was relevant and admissible pursuant to Evidence Code section 1103, the trial court did not abuse its discretion by excluding the evidence because the evidence was weak on the issue of R.C.'s credibility and would require an undue consumption of time.

The trial court explicitly exercised its discretion to exclude the proffered evidence concerning R.C.'s prior rape complaints. Speaking of defendant's accusations that R.C.'s

prior rape complaints were false complaints, the court stated: "I am exercising my discretion under Evidence Code Section 352. At this point I believe these accusations are substantially more prejudicial than they are probative."

"[A] prior false accusation of sexual molestation is . . . relevant on the issue of the molest victim's credibility." (*People v. Franklin*, *supra*, 25 Cal.App.4th at p. 335.) The same is true of a prior false rape complaint. (*People v. Adams* (1988) 198 Cal.App.3d 10, 18.) However, R.C.'s prior rape complaints would have no bearing on her credibility unless it was also established that those prior complaints were false. (See *People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, 599-600.)

Section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "[A] trial court's exercise of discretion under Evidence Code section 352 will not be reversed on appeal absent a clear showing of abuse. [Citations.] It is also established that 'Evidence Code section 352 must bow to the due process right of a defendant to a fair trial and his right to present all relevant evidence of significant probative value to his defense.'" [Citations.] This does not mean that an unlimited inquiry may be made into collateral matters; the proffered evidence must have more than 'slight-relevancy' to the issues presented. [Citation.] . . . [Citation.] The proffered

evidence must be of some competent, substantial and significant value. [Citations.]" (*People v. Northrop* (1982) 132 Cal.App.3d 1027, 1042, disapproved on other grounds in *People v. Smith* (1984) 35 Cal.3d 798, 807-808, italics omitted.) A trial court's exercise of discretion under section 352 "will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Defendant's problem in showing that the trial court abused its discretion in excluding the evidence concerning the prior rape complaints is that it is not readily apparent that those prior complaints were false. While a prior false complaint establishes an instance of dishonesty on the very issue hotly disputed in this case, that is, whether R.C. consented to the sexual acts, a prior complaint not proven to be false has no such bearing.

The Supreme Court upheld a trial court's exercise of discretion to exclude evidence pursuant to section 352 under facts similar to those presented here. (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1097.) The court stated: "[A witness] testified that when she rejected defendant's advances, he pulled a gun and said, 'you wouldn't argue if I pulled the trigger.' Defense counsel sought to impeach her by evidence that she had made false charges of sexual molestation against two other men. The trial court upheld an objection under Evidence Code section 352. Its ruling is not an abuse of discretion. The value of

the evidence as impeachment depends upon proof that the prior charges were false. This would in effect force the parties to present evidence concerning two long-past sexual incidents which never reached the point of formal charges. Such a proceeding would consume considerable time, and divert the attention of the jury from the case at hand." (*People v. Bittaker, supra*, at p. 1097.)

The same is true here. Although there was some evidence that R.C. made inconsistent statements, there was no conclusive evidence that her prior rape complaints were false. The defense was unable to obtain evidence from the men that R.C. accused, and inferences could be drawn either way from the circumstances of the prior incidents and R.C.'s statements concerning the incidents. In addition to the weaknesses in the evidence concerning falsity of the rape complaints, admitting the evidence would have resulted in an undue consumption of time as the defense attempted to bolster its view and the prosecution introduced evidence that Crawford had raped another female student. We therefore cannot say that the trial court abused its discretion in excluding the evidence based on the weak nature of the evidence of falsity of the complaints and the confusion of the jury and consumption of time it would have engendered for the parties to embark on the task of litigating the truthfulness of R.C.'s prior complaints.

II

Prior Sexual Offense

Pursuant to a motion by the prosecution and after carefully considering the application of section 352, the trial court admitted, under Evidence Code section 1108 (hereafter, section 1108), evidence of defendant's prior assault with intent to commit rape. On appeal, defendant contends that section 352 required exclusion of the evidence because the prejudice caused by the evidence substantially outweighed its probative value. We disagree.

A. *Legal Framework*

Section 1108, subdivision (a) states: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." "The effect of section 1108 was 'to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and the defendant's credibility. In this regard, section 1108 implicitly abrogates prior decisions . . . indicating that "propensity" evidence is per se unduly prejudicial to the defense. [Citation.]' (*People v. Falsetta* (1999) 21 Cal.4th 903, 911 (*Falsetta*).) Our Supreme Court has determined that the admission of evidence regarding a defendant's propensity to commit a sex act under section 1108 does not violate the defendant's right to due process of law.

(*Falsetta, supra*, at pp. 910, 922.)" (*People v. Branch* (2001) 91 Cal.App.4th 274, 281.)

Section 1108 requires the trial court to determine whether the evidence is admissible under section 352. "Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense. [Citations.]"

(*Falsetta, supra*, 21 Cal.4th at p. 917.)

Here, defendant asserts only that the evidence should have been excluded pursuant to section 352. "We review a challenge to a trial court's choice to admit or exclude evidence under section 352 for abuse of discretion. (*People v. Harris* (1998) 60 Cal.App.4th 727, 736-737) We will reverse only if the court's ruling was 'arbitrary, whimsical, or capricious as a matter of law. [Citation.]' (*People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1614.)" (*People v. Branch, supra*, 91 Cal.App.4th at p. 282.)

B. *Background*

Late at night on June 24, 1998, L.H. was sitting in a car at a park with her boyfriend. Defendant and another, heavier man approached the car and, brandishing a gun, ordered the couple out of the car and into the park. The two men asked for the couple's valuables and were given a wallet, a gold chain, and a several dollars. The heavier man told the couple to take off their clothing so the couple would not follow the two men.

After L.H. took off her sweater, defendant began making comments about her appearance. He grabbed her by the arm and led her to a different part of the park. There, he told her to take off her clothing. She pleaded with him not to make her do it, but eventually took off most of her clothing when defendant threatened to have the heavier man shoot her boyfriend. Defendant told her he wanted to feel himself inside of her. When dogs began barking from a nearby yard, however, the heavier man yelled at defendant. While defendant went to respond to the heavier man, L.H. put some of her clothing back on. She did not attempt to escape, however, because she feared the men would kill her boyfriend.

The men dropped the boyfriend's wallet and could not find it, so the heavier man told defendant to go to their bicycles and get a flashlight. Defendant went but returned upset because the bicycles had been taken. He hit the boyfriend in the face and, using profane language as he had throughout the incident, told the heavier man that they would have been gone already if the heavier man had allowed him to rape L.H. Defendant kneed

L.H. in the back, knocking her to the ground. He elbowed her in the face to keep her on the ground and put his hand under her sweater and grabbed her breasts. The heavier man, after several attempts, pulled defendant off of L.H.

As the men were leading L.H. and her boyfriend back toward the car, L.H. stepped on the wallet the men had been looking for. The heavier man took it and said they were going to an ATM so that the boyfriend could withdraw money for them. Defendant yanked L.H. by the hair and told her he was going to break her neck. As the group approached the car, a police vehicle arrived. Defendant was apprehended, and L.H. identified him as her assailant.

Before trial in the current case, the prosecution moved to admit the evidence of the June 1998 incident, and the defense moved to exclude the evidence. At a hearing on the motions, the trial court determined that the evidence was admissible pursuant to section 1108. The court also determined that the consumption of time, potential for confusion, and prejudicial effect of the evidence did not significantly outweigh its probative value and therefore allowed the prosecution to introduce it.

The parties stipulated that, in November 1998, defendant "was convicted after trial of committing an assault with intent to commit rape"

C. *Discussion*

Defendant contends that the trial court abused its discretion in admitting the evidence under section 352 because of (1) the inflammatory nature of the evidence concerning the

crimes against L.H. and her boyfriend and (2) the potential that the jury would be confused by admission of the evidence concerning the crimes against L.H. and her boyfriend. We disagree. The evidence of the crimes against L.H. and her boyfriend was not unduly inflammatory. And we perceive no juror confusion.

Defendant argues that "weighing heavily on the prejudice side of the [section 352] equation is that the offenses against [L.H. and her boyfriend] were more inflammatory than the evidence of the charged crimes against [R.C.]" In support of this argument, defendant states that, in the June 1998 incident, he (1) had an accomplice, (2) displayed a gun, (3) used profane language, (4) explicitly threatened to have his accomplice kill L.H.'s boyfriend, (5) persisted in his demands despite L.H.'s pleas, (6) used violence, and (7) threatened additional violence. While these actions during the June 1998 certainly were despicable, they were not of the sort to require exclusion.

The contention that the evidence of crimes against L.H. and her boyfriend was inflammatory when compared to the crimes against R.C. is not persuasive. Defendant assaulted and robbed a deaf woman, exhibited a weapon, and completed a rape against her. The nature of the crimes against L.H. and her boyfriend, though different, was no more brutal than the crimes against R.C. Defendant's propensity to commit a sex offense was shown by his willingness to rape L.H. And although the crimes against L.H. and her boyfriend occurred seven years before the crimes against R.C., they were not so remote as to lose their

relevance. (See *Falsetta*, *supra*, 21 Cal.4th at p. 917 [requiring trial judges to consider nature, relevance, and remoteness of prior sex offense].)

Neither was the evidence of crimes against L.H. and her boyfriend confusing to the jury. As defendant stipulated, he was convicted of the 1998 crime, so this was not a trial of whether he committed those acts. It was unlikely that the evidence of the prior sex offense would confuse, mislead, or distract the jurors from their task with respect to the current offenses. (See *Falsetta*, *supra*, 21 Cal.4th at p. 917 [requiring trial judges to consider certainty of commission and likelihood of juror confusion].)

Accordingly, we conclude the trial court did not abuse its discretion in admitting the evidence of crimes against L.H. and her boyfriend.²

III

Admission of Knife as Evidence

Defendant contends that admission into evidence of a knife found in a search of his residence one month after the rape of R.C. but not used in that rape was an abuse of discretion. We conclude there was no abuse of discretion.

² Defendant cites, quotes, and discusses our Evidence Code section 352 analysis in a partially published opinion, *People v. Cromp* (2007) 153 Cal.App.4th 476. That analysis, however, was in the unpublished portion of the opinion. The published portion of the opinion related only to a jury instruction. Therefore, we disregard defendant's discussion of that case. (See Cal. Rules of Court, rules 8.1110, 8.1115(a).)

A. *Objection to Admission of the Knife*

In a written motion, defendant objected to admission of exhibit 37A, a folding knife. Defense counsel argued that R.C. would not be able to identify the knife as the one that defendant used. Therefore, asserted counsel, admission of the knife would be unduly prejudicial.

At a hearing on the motion, defense counsel reiterated the argument, stating: "There is no evidence that that knife was actually used in the alleged crime. Furthermore, the defendant's sister informed the police it was her knife at the time. There's nobody that can independently verify that that knife was actually used. And the jury would be misled into believing that that knife was used in the crime where the issue is consent." The prosecution maintained, however, that the knife generally fit the description that R.C. had given of the knife that defendant used. R.C. had stated that defendant used what she believed was a folding knife. She described it as a silver knife but was not asked whether she was describing the handle or blade. The exhibit had a dark handle with a metallic clip and a metallic blade. The knife was found in plain view in defendant's residence within a month of the incident.

The trial court admitted the evidence. It found that there was a sufficient evidentiary foundation for admission and that the issue of whether the knife was the one that defendant used during the rape was for the jury to decide. When R.C. was shown the knife at trial, she testified that it did not look the same as the one that defendant had the night of the rape. She stated

that she did not see the handle of the knife that defendant was holding. She thought that the exhibit was a little bigger than what she remembered.

B. *Discussion*

Defendant asserts that the trial court erred by not excluding the evidence pursuant to section 352. He claims that the relevance of the knife depended on R.C.'s ability to identify the knife as the one defendant used. He also claims that admission of the knife was unnecessary to the prosecution's case and it created the possibility that the jury would have an unwarranted emotional response to seeing the exhibit. We disagree that these reasons support a finding that that trial court abused its discretion.

As noted above, section 352 requires exclusion of evidence only when "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." (§ 352.)

Although R.C. could not identify the knife as the one defendant used, it was similar to her description. R.C. was unwavering in her statements that defendant used a knife. And the exhibit was found in defendant's residence not long after the rape. Admission of the exhibit also allowed R.C. to be more specific in what she remembered by comparing what she remembered to the appearance of the exhibit, even if she did not think it

was the same knife. Therefore, the exhibit was probative evidence.

Defendant relies on *People v. Riser* (1956) 47 Cal.2d 566, a homicide case, for the proposition that it is error to introduce evidence that the defendant possessed a weapon if that weapon could not be the one the defendant used in committing the alleged crime. In *Riser*, the prosecution introduced evidence that the defendant possessed several firearms and a substantial amount of ammunition, but the evidence of what weapon the defendant used in committing the crime necessarily eliminated the firearms as possibilities. In finding error, the court stated: "When the specific type of weapon used to commit a homicide is not known, it may be permissible to admit into evidence weapons found in the defendant's possession some time after the crime that could have been the weapons employed. There need be no conclusive demonstration that the weapon in defendant's possession was the murder weapon. [Citations.] When the prosecution relies, however, on a specific type of weapon, it is error to admit evidence that other weapons were found in his possession, for such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons. [Citations.]" (*Id.* at p. 577.)

Riser does not support defendant's assertion. The exhibit was not inconsistent with what the prosecution asserted that defendant used in committing the offenses against R.C. The exhibit fit R.C.'s description generally, and the prosecution

was free to use the exhibit to question R.C. Furthermore, the exhibit was not part of an arsenal of weapons. Instead, it was a single knife. Because R.C.'s testimony was that defendant used a knife, it is unlikely that the jury was affected emotionally by the appearance of a knife as an exhibit.

Defendant therefore fails to establish that the prejudicial effect of admission of the exhibit substantially outweighed its probative value. There was no abuse of discretion.

IV

Effective Assistance of Counsel

Defendant contends that his trial counsel provided ineffective assistance of counsel because he failed to object to admission of portions of defendant's statement to a police officer. We conclude that, even assuming trial counsel should have objected to admission of portions of the statement, it is not reasonably probable that defendant would have achieved a better result had defense counsel made the objections that defendant now asserts he should have made.

A. *Right to Effective Counsel*

"To succeed in a claim of ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that, but for counsel's error, the outcome of the proceeding, to a reasonable probability, would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 693-694 [80 L.Ed.2d 674]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) If the record on appeal sheds no light

on why counsel acted or failed to act in the manner challenged, the claim on appeal must be rejected unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264.)" (*People v. Lawley* (2002) 27 Cal.4th 102, 133, fn. 9.) "If defendant fails to show that he was prejudiced by counsel's performance, we may reject his ineffective assistance claim without determining whether counsel's performance was inadequate. (*Strickland, supra*, 466 U.S. at p. 697 [80 L.Ed.2d at pp. 699-700].)" (*People v. Sanchez* (1995) 12 Cal.4th 1, 41.)

B. *Defendant's Statement*

Defendant was questioned at the police station by Detective Jimmy Vigon of the Sacramento Police Department on October 10, 2005, exactly one month after the crimes against R.C. Detective Vigon told defendant that defendant's girlfriend and sister, both of whom lived at defendant's residence, told officers that he did not live there, even though that was the address he had reported for purposes of registering as a sex offender. Defendant said that they lied because they did not want him to be found and arrested. In going over his prior record of arrests and convictions with Detective Vigon, defendant said that he been arrested for kidnapping, attempting to commit a sex offense, marijuana possession and giving a false name and for another unspecified matter that resulted in a stay at juvenile hall when he was 15 or 16 years old. He committed a robbery when he was 14 years old. The robbery occurred when he and some

friends "jumped" another child and took his bicycle. When asked about a knife in connection with the crimes against R.C., defendant said that he had several knives, including a black folding knife, and a little pellet gun. His brothers also had folding knives. When the interview was completed, defendant was handcuffed. The jury was shown a video of the interview.

The video of defendant's interview with Detective Vigon was admitted into evidence to show defendant consciousness of guilt because, when Detective Vigon showed defendant a picture of R.C. and asked him about her, defendant claimed not to have ever met her or to have had sex with a woman at the College Greens light rail station. These claims were contrary to defendant's defense at trial that the encounter was consensual.

C. *Lack of Prejudice*

On appeal, defendant asserts that trial counsel should have moved to exclude the following portions of the interview: (1) reference to his duty to register as a sex offender and lying about his residence, (2) his association with people willing to lie to protect him, (3) his prior arrests, convictions, and stay at juvenile hall, (4) his and his brother's possession of knives and a pellet gun, and (5) the last part of the video during which he was handcuffed. The Attorney General proffers some reasons that trial counsel may have decided not to object as a matter of strategy. However, we need not engage in that process because, even if counsel was constitutionally deficient for not objecting to the noted parts of the videotaped interview, the deficiency did not render it

reasonably probable that the outcome of the trial would have been different if counsel had objected. (See *Strickland v. Washington*, *supra*, 466 U.S. at p. 697.)

There was overwhelming evidence that defendant raped R.C. The physical evidence, R.C.'s statements, and defendant's falsifications all lead to a finding of guilt. His defense at trial that the sexual acts he performed on R.C. were consensual was simply incredible.

This is not a case in which the admissible evidence presented a picture of a defendant without serious criminality in his past. Pursuant to section 1108, the prosecution presented evidence of defendant's crimes against L.H. and her boyfriend. The additional evidence of lesser crimes, therefore, would have little sullying effect on the jury's impression of defendant.

Because admission of the portions of the interview that defendant now claims trial counsel should have objected to did not contribute to the verdict against him, we need not consider whether trial counsel rendered deficient representation by not objecting. The contention of ineffective assistance of counsel is without merit.

V

CALCRIM No. 220

Defendant asserts that the trial court's use of CALCRIM No. 220 to instruct the jury improperly prohibited the jurors from considering whether the lack of evidence, as opposed to the admitted evidence, supported a reasonable doubt concerning

defendant's guilt. As have other courts considering CALCRIM No. 220's accuracy and sufficiency, we conclude that defendant's assertion is without merit.

The trial court instructed the jury, using CALCRIM No. 220, that, in deciding whether the prosecution had proven defendant's guilt beyond a reasonable doubt, it was to "consider all the evidence that was received throughout the entire trial."³ Defendant claims that the failure to tell the jury that it could base reasonable doubt on the absence of evidence violated his due process rights by lightening the prosecution's burden of proof.

This contention has been rejected in several cases. (See *People v. Campos* (2007) 156 Cal.App.4th 1228, 1238; *People v. Flores* (2007) 153 Cal.App.4th 1088, 1093; *People v. Hernández Ríos* (2007) 151 Cal.App.4th 1154, 1157; *People v. Westbrooks* (2007) 151 Cal.App.4th 1500, 1509.)

As defendant notes, jury instructions are erroneous only if there is a reasonable likelihood that the jury misunderstood them. (*People v. Cain* (1995) 10 Cal.4th 1, 36.) In determining whether there is such a likelihood, we consider the specific language of the challenged instruction, the instructions as a

³ The full paragraph of this portion of the instruction, as given, states: "In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty."

whole, and the jury's findings. Having done so, we conclude there is no reasonable likelihood the jury misunderstood CALCRIM No. 220 and misapplied the law. As stated in *People v. Campos*, *supra*, 156 Cal.App.4th at page 1238, "the instruction did not tell the jury that the reasonable doubt had to arise out of the evidence in the case. It merely said that the jury was to consider all of the evidence presented." Because a reasonable jury would not have interpreted the instruction as precluding it from basing a reasonable doubt on the lack of evidence, defendant's assertion to the contrary is without merit.

VI

Asserted Cumulative Error

Defendant contends that, even if we conclude that errors committed at trial and deficiencies of trial counsel were not prejudicial by themselves, they are cumulatively prejudicial. We disagree. Error, if any, was not cumulatively prejudicial.

VII

First Strike Allegations

Defendant contends, and the Attorney General concedes, that enhancement findings under Penal Code section 667.61, subdivision (e)(1) as to counts three, four, and five must be stricken. We agree.

Penal Code section 667.61, the "first strike" law, provides for a term of 25 years to life or 15 years to life for specified crimes committed under specified circumstances.⁴ Subdivision (d)

⁴ Penal Code section 667.61 states, in pertinent part:

"(a) Any person who is convicted of an offense specified in subdivision (c) under one or more of the circumstances specified in subdivision (d) or under two or more of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for 25 years to life.

"(b) Except as provided in subdivision (a), any person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for 15 years to life.

"(c) This section shall apply to any of the following offenses:

"(1) Rape, in violation of paragraph (2) or (6) of subdivision (a) of Section 261.

".

"(5) Sexual penetration, in violation of subdivision (a) of Section 289.

".

"(d) The following circumstances shall apply to the offenses specified in subdivision (c):

".

"(2) 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 in subdivision (c).

".

lists the circumstances prompting a term of 25 years to life, and subdivision (e) lists the circumstances prompting a term of 15 years to life. The jury found true circumstances pursuant to subdivisions (d)(2) [moving during kidnapping substantially increasing risk to victim] and (e)(1) [kidnapping] as to counts three through five (one count of rape and two counts of sexual penetration).

Although the jury found both circumstances true, Penal Code section 667.61 does not allow both to be applied to the same count. Subdivision (e)(1) includes the introductory clause, "Except as provided in paragraph (2) of subdivision (d)." Although somewhat opaque, this clause arguably excludes from the scope of subdivision (e)(1) any kidnapping that would qualify under Penal Code section 667.61, subdivision (d)(2), that is, where "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."

Therefore, the true finding under Penal Code section 667.61, subdivision (e)(1) must be stricken from counts three through five. This modification, however, does not affect the sentence because defendant was sentenced under the harsher terms

"(e) The following circumstances shall apply to the offenses specified in subdivision (c):

"(1) Except as provided in paragraph (2) of subdivision (d), the defendant kidnapped the victim of the present offense in violation of Section 207, 209, or 209.5."

of the Three Strikes law, not pursuant to Penal Code section 667.61.

VIII

Correction of Abstract

The jury found true that defendant personally used a knife pursuant to Penal Code section 12022, subdivision (b)(1) in connection with counts one and nine. The trial court properly sentenced according to the provisions of that section. However, the minute order and the abstract of judgment both incorrectly list the personal use provision as Penal Code section 12022.5, subdivision (b)(1). Defendant contends, and the Attorney General agrees, that the minute order and the abstract of judgment must be amended to reflect the proper code section.

IX

Use of Juvenile Adjudications as Strikes

Defendant contends that the trial court's use of his prior juvenile adjudications of criminal offenses as strikes under the Three Strikes law violated his right to jury trial under *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435]. As have numerous other appellate courts, we reject this contention.⁵

⁵ In his opening brief, appellant relied on *People v. Nguyen* (2007) 152 Cal.App.4th 1205, review granted October 10, 2007, S154847, to support the proposition that juvenile priors cannot be used to increase an adult defendant's sentence. As the Supreme Court has since granted review in *Nguyen*, appellant acknowledges it is no longer citable authority.

Defendant agrees with the decision in *United States v. Tighe* (9th Cir. 2001) 266 F.3d 1187 (*Tighe*). In *Tighe*, the Ninth Circuit, in a two-to-one vote, held that a federal sentencing court could not use a prior juvenile adjudication to increase the defendant's penalty beyond that authorized for the current offense. The *Tighe* court reasoned that the "prior conviction" exception of *Apprendi* is limited to those convictions that complied with due process by affording a right to a jury trial and requiring proof beyond a reasonable doubt. (*Tighe, supra*, at p. 1194.) Because defendant did not have a right to jury trial in the juvenile court, he asserts the trial court, here, could not use those adjudications as strikes.

We are not bound by the decisions of federal circuit courts, even on federal questions. (*People v. Superior Court (Moore)* (1996) 50 Cal.App.4th 1202, 1211.) *Tighe*, which includes a strong dissent on the issue of juvenile priors, has been criticized by a number of subsequent federal decisions from other circuits (see *United States v. Burge* (11th Cir. 2005) 407 F.3d 1183, 1190; *United States v. Jones* (3d Cir. 2003) 332 F.3d 688, 695-696; *United States v. Smalley* (8th Cir. 2002) 294 F.3d 1030, 1032-1033, and its reasoning has been rejected by several districts of the Court of Appeal in this state. (See *People v.*

In the parties' stipulation at trial, they agreed that defendant was "convicted" of the 1998 offenses, not that they were adjudicated in the juvenile court. We need not resolve the apparent inconsistency because the contention is without merit, in any event.

Superior Court (2003) 113 Cal.App.4th 817, 830-834; *People v. Lee* (2003) 111 Cal.App.4th 1310, 1315-1316; *People v. Smith* (2003) 110 Cal.App.4th 1072, 1075-1079; *People v. Bowden* (2002) 102 Cal.App.4th 387, 393-394.) In *People v. Palmer* (2006) 142 Cal.App.4th 724, this court declined to follow *Tighe* and, rather, followed *Bowden*. (*People v. Palmer*, *supra*, at p. 733.)

In summary, these cases hold that, because a juvenile, without a jury trial, can be reliably and constitutionally adjudicated as having committed acts that would be crimes if he were an adult, using that adjudication to increase a later adult sentence does not run afoul of the right to jury trial. (See *People v. Bowden*, *supra*, at p. 392, quoting *People v. Fowler* (1999) 72 Cal.App.4th 581, 585-586.) Therefore, defendant's assertion that his jury trial rights were violated because the trial court used his juvenile adjudications as strikes is without merit.

DISPOSITION

The jury's true findings in counts three, four, and five of an enhancement pursuant to Penal Code section 667.61, subdivision (e)(1) are stricken. As modified, the judgment is affirmed. The trial court is directed to amend the minute order of sentencing to reflect the proper code section for imposing personal use enhancements, as discussed in part VIII of the discussion. The trial court is also directed to prepare an amended abstract of judgment reflecting (1) the striking of the Penal Code section 667.61, subdivision (e)(1) enhancements, as stated above, and (2) the proper code section for imposing the

personal use enhancements, as discussed in part VIII of the discussion, and to send the amended abstract to the Department of Corrections and Rehabilitation.

NICHOLSON, J.

We concur:

SIMS, Acting P.J.

CANTIL-SAKAUYE, J.