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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. EDWARD LEE TURNER, Defendant and Appellant.	A105680 (Contra Costa County Super. Ct. No. 050112631)

Edward Lee Turner was convicted of multiple counts, committed against four different victims, of forcible oral copulation (Pen. Code,[1] § 288a, subd. (c)(2)), forcible rape (§ 261, subd. (a)(2)), aggravated assault (§ 245, subd. (a)(1)), false imprisonment by violence (§§ 236, 237), making criminal threats (§ 422), kidnapping (§ 207), residential robbery (§§ 211, 212.5), and torture (§ 206). The court also found true allegations of seven prior convictions under the Three Strikes Law (§ 1170.12), several prior serious felony convictions (§ 667, subd. (a)(1)), a prior conviction under the One Strike Law (§ 667.61) and two prior prison terms (§ 667.5, subd. (b)). The court sentenced defendant to a total prison term of 283 years to life.

We shall reverse defendant's conviction for robbery (count 12), on the ground that the prosecution was barred by the applicable statue of limitations, and remand for resentencing. In all other respects, the judgment shall be affirmed.

* Under California Rules of Court, rules 976(b) and 976.1, only the two introductory paragraphs, Part I of the Discussion section on pages 4-12, and the Conclusion are certified for publication.

[1] All subsequent statutory references are to the Penal Code unless otherwise indicated.

FACTS[2]

Jane Doe 1—May 20, 2001 [Counts 1-6]

Jane Doe 1 was a homeless drug addict and prostitute who frequented a park in Richmond, where she met defendant. On May 20, 2001, she went with defendant to his trailer, a few blocks from the park, to see a book he had agreed to show her. Once inside the trailer, defendant offered her crack cocaine and $3 in exchange for sex. She refused, and started to leave. Defendant stood in her way, holding a knife. He forced her to orally copulate him. He then demanded that she have intercourse with him. She stated she wanted him to use a condom. He initially acceded to her request, but interrupted intercourse to remove the condom, and resumed the assault, as she cried. He held a knife to her throat, told her to shut up, and that she had "nothing to lose." She begged him to let her leave, but he hog-tied her with shoestring and duct tape, and also duct-taped her mouth. He told her she was going to be his sex slave. When he eventually left the trailer, she was able to free herself by burning the string.

After smoking some crack cocaine, Jane Doe 1 called the police. When Officer Longacre arrived he observed a cut on Doe 1's right hand and sticky tape residue around her ankles. As the officer drove Doe 1 to the scene of the reported assault, she saw a man she believed to be defendant riding by on a bicycle. Officer Longacre detained him, and Doe 1 positively identified him. After obtaining a warrant, the police searched the trailer, and found, among other things, clothes belonging to Doe 1, duct tape, and burned string.

Jane Doe 2—November 2, 2000 [Counts 7-11]

The court determined that Jane Doe 2 was unavailable for trial. Instead, her preliminary hearing testimony was read to the jury. In the evening of November 2, 2000, Jane Doe 2 was driving through the city of Richmond. She pulled over and asked defendant if he knew where to get some crack cocaine, and he said he did. They went to his trailer and smoked crack together. Suddenly defendant's demeanor changed. He told her he was going to keep her there, punched her, and forced her to orally copulate him.

[2] The facts will be summarized in more detail only as relevant to our analysis of the issues raised.

He told her he was not ever going to let her leave. When defendant went to the bathroom, she escaped, only partially clothed. Officer Cantrell came upon Doe 2, who was hysterical, in an alley near the trailer. She had suffered injuries and her face was swollen. The police did not find defendant in the trailer, but did find clothing belonging to Doe 2. About four hours later they found defendant and arrested him.

Jane Doe 4[3]—October 24-27, 1995 [Counts 12-14]

On October 24, 1995, Jane Doe 4 was walking in the area of Fourth Street in Richmond when a man approached her from behind, pressed an object into her back and told her to keep walking or he would kill her. The man led her to a trailer near an alley, ordered her to undress, and tied her up with a rope. When she asked why he abducted her, he said something about her having called the police on his nephew. While she was tied up, the man took a $100 bill from her purse, and went out to buy cigarettes, liquor and crack cocaine. He got high when he returned, and said he was going to have sex with her, and would kill her if she did not cooperate.

Defendant held her prisoner for the period between October 24 through October 27. He beat her with a two-by-four piece of lumber, punched her in the face, and attempted to smother her with a pillow, causing her briefly to lose consciousness. He eventually left the trailer again. When a woman entered a few minutes later, Doe 4 pleaded for help and the woman untied her. Doe 4 dressed and ran to her mother's house, and then went to a hospital, where she made a police report.

Officer Cantrell responded to the report of a battery victim. Doe 4 described her attacker and the alleyway where the attack occurred. She also recalled the name Edward was scratched on one of the walls. Officer Cantrell was familiar with defendant and where he lived, so he included defendant's photo in a photo array. Doe 4 identified defendant's photograph. She also identified defendant at trial.

Jane Doe 5—September 29, 1995 [Counts 15-17]

On September 29, 1995, at approximately 6 p.m., Jane Doe 5 saw defendant, whom she had met once before, on Fifth Street in Richmond. She agreed to have dinner

[3] Counts involving Jane Doe 3 were dismissed before trial.

with defendant at his trailer. After smoking crack, he ordered her to undress and put on lingerie. He tied her hands with a shoestring. He held a knife to her throat and forced her to orally copulate him. He eventually untied her, and she escaped into the alley, where she began screaming for help. Defendant chased her, but stopped when she reached the alley.

Officer Anthony Mikell responded to a call, and found Doe 5 standing in the street wearing lingerie and a trench coat. She described being forced to orally copulate defendant. She pointed out defendant, who was standing outside the trailer, and Officer Mikell arrested defendant. She declined to go to the hospital. The police entered the trailer with Doe 5. Inside the trailer Doe 5 identified some of her clothing, and her shoes. Police officers also testified that they found white string on the bed, but found no knife in the trailer or on defendant's person.

DISCUSSION

I.

Denial of the Motion to Dismiss the 1995 Robbery Count as Barred by Statute of Limitations

Defendant first contends that the court erred in denying his motion to dismiss count 13 for first degree robbery, on the ground the prosecution was barred by the applicable statute of limitations. Before addressing defendant's specific contention, we briefly provide some background on the relevant statutory scheme.

Statutory Background

The current scheme of criminal statutes of limitation is set forth in sections 799 through 805. In 1981, in recognition of the fact "that piecemeal amendment over the years had produced a scheme that was confusing, inconsistent, and lacking in cohesive rationale," the Legislature referred the matter to the Law Revision Commission for comprehensive review. (*People v. Frazer* (1999) 21 Cal.4th 737, 743; Stats. 1981, ch. 909, § 3, p. 3443.) In 1984, the Legislature overhauled the entire scheme. (Stats. 1984, ch. 1270, §§ 1-2, pp. 4335-4337.) The revised scheme reflected the primary recommendation of the Law Revision Commission that the length of a "limitations statute

should generally be based on the seriousness of the crime." (17 Cal. L. Revision Com. Rep. (1984) p. 313.) The use of seriousness of the crime as the primary factor in determining the length of the applicable statute of limitations was designed to strike the right balance between the societal interest in pursuing and punishing those who commit serious crimes, and the importance of barring stale claims. (*Id*. at p. 314.) It also served the procedural need to "provid[e] predictability" and promote "uniformity of treatment for perpetrators and victims of all serious crimes." (*Ibid*.) The commission suggested that the seriousness of an offense could easily be determined in the first instance by the classification of the crime as a felony rather than a misdemeanor. Within the class of felonies, "a long term of imprisonment is a determination that it is one of the more serious felonies; and imposition of the death penalty or life in prison is a determination that society views the crime as the most serious." (*Id.* at p. 313.)

Reflecting these principles, the current statutory scheme of limitations for the prosecution of crimes turns on the maximum punishment prescribed for the offense. The shortest limitation period of one year applies to most misdemeanors. (§ 802.) For most felonies, including wobblers, the applicable statute of limitations is section 801, which provides that the "prosecution for an offense punishable by imprisonment in the state prison shall be commenced within three years after the commission of the offense." If, however, the prosecution is for a felony "punishable by imprisonment in the state prison for eight years or more," the prosecution may be commenced within six years. (§ 800.) Finally, with an exception not relevant here, only a prosecution for "an offense punishable by death or imprisonment in the state prison for life . . . may be commenced at any time." (§ 799.) Section 805, subdivision (a) further specifies that for the purpose of determining the applicable limitation period, "[a]n offense is deemed punishable by the maximum punishment prescribed by statute for the offense, regardless of the punishment actually sought or imposed. Any enhancement of punishment prescribed by statute shall be disregarded in determining the maximum punishment prescribed by statute for an offense."

Determination of Statute of Limitations Applicable to Count 13

Defendant moved to dismiss count 13, which charged a first degree residential robbery involving Jane Doe 4, because it was alleged to have occurred between October 24-27, 1995, yet the information charging the robbery count was not filed until 2001, more than three years after the offense was committed. (§§ 801; 804, subd. (a) [prosecution commences when an indictment or information is filed].)[4] First degree residential robbery by a defendant acting alone is punishable by a maximum prison term of six years, and therefore falls within the category of felonies to which section 801 applies. (§ 213, subd. (a)(1)(B); see, e. g., *People v. Douglas* (1966) 246 Cal.App.2d 594, 598 [prosecution for robbery was commenced within the three-year period specified in § 801].) Nonetheless, the trial court denied defendant's motion because it determined that, in this case, section 799 applied. The court reasoned that the information also included allegations under the Three Strikes Law that defendant had multiple prior serious felony convictions. Under that alternate sentencing scheme, upon conviction of the robbery *and* findings that two of the prior serious felony conviction allegations were true, defendant would be subject to an indeterminate term of 25 years to life in prison. (§§ 667, subd. (e)(2)(a); 1170.12, subd. (c)(2)(A).) The court concluded that, in this case, the robbery was punishable by "imprisonment in the state prison for life" and therefore could be prosecuted "at any time." (§ 799.)

Defendant argues the court erred because the determination of the applicable statute of limitations is made based on the maximum punishment prescribed for the offense itself, not the indeterminate life term prescribed by the alternate sentencing scheme of the Three Strikes Law, to which he is subject based upon the additional allegations of his status as a recidivist. The question whether an offense that normally is

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[4] The prosecution may also be commenced when an arrest warrant or bench warrant is issued. (§ 804, subd. (d).) The district attorney did not, however, contend that the prosecution was commenced any earlier than the filing of the information in 2001, or that the statutory period was tolled for any reason. (§ 803.) Nor does the Attorney General contend on appeal that, if section 801 is the applicable limitation period, the prosecution was commenced within the period, or that the statute was tolled.

subject to the limitation period of section 801 instead may be prosecuted "at any time," pursuant to section 799, when allegations of a defendant's recidivist status expose the defendant to an indeterminate life term under the Three Strikes Law, is an issue of first impression. The issue is one of statutory interpretation, and turns on the meaning, in section 799, of "an offense punishable by . . . imprisonment in the state prison for life," and in section 805 of "the maximum punishment prescribed by statute for the offense." Specifically, the issue is whether the "offense" referred to must *itself* be punishable by life imprisonment, or whether the Legislature intended to include any offense which may result in a life sentence based upon facts other than the commission of the offense itself. We shall conclude that the former interpretation is correct, and therefore shall reverse defendant's conviction for robbery.

" 'As in any case involving statutory interpretation, our fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose. [Citation.] We begin by examining the statute's words, giving them a plain and commonsense meaning. [Citation.] We do not, however, consider the statutory language "in isolation." [Citation.] Rather, we look to "the entire substance of the statute . . . in order to determine the scope and purpose of the provision . . . . [Citation.]" [Citation.] . . . We must harmonize "the various parts of a statutory enactment . . . by considering the particular clause or section in the context of the statutory framework as a whole." [Citations.]' " (*People v. Garrett* (2001) 92 Cal.App.4th 1417, 1422.)

We base our conclusion that, for the purpose of determining the applicable statute of limitations, the maximum punishment is the punishment prescribed for the offense itself, primarily upon our interpretation of the plain language of section 799 and section 805. Both sections 799 and 805 refer only to prosecution for an "*offense*," and punishment prescribed by "statute for the *offense*," not to prosecution and punishment that applies to a particular *offender*, and which is based upon facts other than the commission of the offense for which he or she is being prosecuted. The Penal Code defines an "offense" as "an *act* committed or omitted in violation of a law forbidding or commanding it." (§ 15, italics added.) In the context of selecting the applicable statute

of limitations for a prosecution, the " act" or "offense" must refer to the current felony for which the defendant is to be, or is being, prosecuted, not the facts of prior convictions, because the prior convictions are based on records of prosecutions that have already been brought. The maximum punishment prescribed by "statute for the *offense*" (§ 805, subd. (a), italics added) therefore logically refers to the maximum punishment for the current offense for which the defendant is being prosecuted, and to which he may assert the bar of the statute of limitations.

The punishment of an indeterminate life term under the Three Strikes Law, by contrast, is not a punishment specified by statute for an "offense," i.e., the current act for which the defendant is to be prosecuted. It is an alternative sentence imposed upon those who commit a current felony offense, *and* who are recidivist offenders. The allegations of prior serious felony convictions within the meaning of the Three Strikes Law do not constitute an "offense" for which the defendant is to be prosecuted. Instead these allegations refer only to facts relevant to a particular offender, which if proved establish not the commission of an offense, but his *status* as a recidivist. The indeterminate life term to which the offender may be subject, under the Three Strikes Law, is not a punishment imposed for commission of the "offense," i.e., the current felony offense for which the defendant is being prosecuted. It is an alternative punishment that is imposed *based upon the fact of the defendant's recidivism*, and it is imposed upon conviction of "a felony" without regard to the seriousness of the current felony offense, if the defendant has two or more "serious" or violent felony convictions. (§ 1170.12, subds. (a), (b), (c)(2)(A); see also *People v. Henson* (1997) 57 Cal.App.4th 1380, 1386.) For example, in *People v. Murphy* (2001) 25 Cal. 4th 136, in the context of rejecting a defendant's argument that section 654, which applies only to an "act or omission," precluded sentencing under both the Three Strikes Law and section 667.71, our Supreme Court explained that the increased penalties under these sentencing schemes "depends on a fact—the defendant's status as a repeat offender—*not on an act or omission* " (*id*. at p. 156, italics added) and punishes "the *fact* of defendant's recidivism" (*id*. at p. 155, italics added). For these reasons the indeterminate life term under the Three Strikes Law

is not, within the meaning of section 805, "the maximum punishment prescribed by statute *for the offense* [italics added]." This phrase refers to the punishment prescribed by statute for the commission of the current felony offense itself, not to the alternate punishment that is imposed under the Three Strikes Law based upon the defendant's recidivism.

Construing the term "offense" in sections 799 and 805 to refer to the current felony, and selecting the applicable statute of limitations based upon the "maximum punishment prescribed by statute for the offense," i.e., the statute prescribing punishment for the current felony itself, is consistent with the basic principle underlying the revision of this statutory scheme in 1984 that the selection of the applicable statute of limitation should be based upon the seriousness of the offense as indicated by the punishment prescribed for it. This is so because determining the applicable statute of limitation based upon the punishment prescribed by statute for the current felony itself ensures that selection of the applicable statute of limitation corresponds to the seriousness of the offense for which the defendant is to be prosecuted, rather than on other factors relating not to the offense, but rather to the offender. It also preserves the legislative purpose underlying section 799 that only prosecution of the most serious offenses could be prosecuted "at any time." By contrast, under the construction adopted by the trial court, the prosecution of *any felony, without regard to the seriousness of the current felony offense,* could be commenced at any time, if the offender has the requisite number of qualifying prior convictions, because under the three strikes sentencing scheme a defendant with the requisite number of qualifying prior convictions may be sentenced to a life term upon conviction of "a felony." (§ 1170.12, subds. (a) & (c)(2)(A).) Such a construction would be inconsistent with the Legislature's intention that section 799 apply only to the most serious offenses punishable by death or life imprisonment. (See also *People v. Zamora* (1976) 18 Cal.3d 538, 547-548 ["adoption of a period of limitation represents a legislative recognition that for all but the most serious of offenses (such as murder or kidnapping) a never-ending threat of prosecution is more detrimental to the functioning of a civilized society than it is beneficial"].)

We also find support for our construction in a decision of our Supreme Court interpreting and applying similar statutory language in the context of a defendant who was subject to a life sentence under the Three Strikes Law. (*People v. Thomas* (1999) 21 Cal.4th 1122 (*Thomas*).) Section 799, by its terms, applies to "prosecution for *an offense punishable by death or imprisonment in the state prison for life . . .* [italics added]." In *Thomas, supra*, the court addressed the question whether the limitation of credits in section 2933.1 applied to the defendant. Section 2933.1 applies to a person convicted of a violent felony, which includes "[a]ny felony punishable by death or imprisonment in the state prison for life." (§ 667.5, subd. (c)(7).) The defendant was convicted of a felony that did not itself carry a life sentence, but he received a life sentence because he was sentenced as a recidivist under the Three Strikes Law. Our Supreme Court, albeit in this different statutory context, concluded that the similar phrase "[a]ny felony *punishable by death or imprisonment in the state prison for life*" in section 667.5, subdivision (c)(7) (*Thomas, supra,* at pp. 1127, italics added) refers only to an offense that itself is punishable by life imprisonment, and was not intended to include "any felony the commission of which may result in a life sentence," based upon the defendant's status as a recidivist offender under the Three Strikes Law. (*Ibid*.) We recognize that the interpretation in *Thomas* of similar language in section 667.7, subdivision (c)(7), is not controlling. Nonetheless, we find no reason to adopt a different construction of the similar phrase *"an offense punishable by death or imprisonment in the state prison for life"* in section 799 (italics added), as applied to an offense which is not itself punishable by life in prison, but for which this defendant was eligible to receive an indeterminate life term based upon allegations of prior convictions under the Three Strikes Law.

In support of the alternative construction adopted by the trial court, which selects the applicable statute of limitations based upon the punishment prescribed under the Three Strikes Law for recidivist offenders, the Attorney General relies primarily upon the last sentence of subdivision (a) of section 805, which states: "Any enhancement of punishment prescribed by statute shall be disregarded in determining the maximum

punishment prescribed by statute for an offense." The Attorney General reasons that since the punishment under the Three Strikes law is not an *enhancement,* a point that defendant readily concedes, then the life term that may be imposed pursuant to it must be deemed the "maximum punishment prescribed by statute for [the] offense." All the last sentence of subdivision (a) of section 805 establishes, however, is that enhancements are *not* to be included in the determination of the maximum punishment prescribed by statute for the offense. Since the life term imposed under the Three Strikes Law is not an enhancement, the last sentence of subdivision (a) of section 805 does not answer, and indeed begs the question, whether the alternate life sentence imposed under the Three Strikes Law is a punishment prescribed by "statute *for the offense*." For the reasons we have stated, it is not. Instead, it is an alternate sentencing scheme that applies and imposes punishment based upon the fact of defendant's recidivism. If anything, the direction in section 805 to disregard any enhancements in determining the maximum punishment prescribed for an offense clarifies that the Legislature intended the relevant penalty to be the punishment imposed for commission of the crime itself, not additional or alternative penalties imposed based upon other facts or circumstances such as recidivism. This approach ensures that the selection of the applicable statute of limitations corresponds to the seriousness of the current offense, and that section 799 applies only to the most serious offenses punishable by death or life in prison. (See also Cal. Law Revision Com. com., 50 West's Ann. Pen. Code (1984 ed.) foll. § 799, pp. 191-192 ["A crime punishable by death or life imprisonment . . . is a crime for which the maximum penalty that may be imposed is death or life imprisonment (with or without parole), disregarding enhancement of the penalty in the case of an habitual offender"].) Regardless of whether the punishment imposed under the Three Strikes Law is deemed an enhancement or an alternate sentencing scheme, for the purpose of selecting the applicable statute of limitations, the relevant penalty is that prescribed by statute for commission of the offense itself, not penalties that may be imposed based upon other facts such as the defendant's recidivism.[5]

[5] The Attorney General also relies upon *People v. Harris* (1882) 61 Cal. 136, a

In sum, the plain terms of sections 799 and 805 describe a limitation period that is based upon the maximum punishment for "the offense," meaning the current act or omission for which the defendant is to be prosecuted. The maximum punishment must be determined based upon the punishment prescribed for the commission of the offense itself, without regard to the alternate indeterminate life term that may be imposed under the Three Strikes Law based on allegations that the defendant had suffered two or more prior felony convictions. The current act, or "*offense*," to which defendant asserted the bar of the statute of limitations was the crime of first degree robbery alleged in count 13. The maximum punishment for this "offense" is set forth in section 213, and the three-year period set forth in section 801 applied. In the absence of any evidence or contention that the prosecution commenced any earlier than the filing of the information in 2001, or that the statutory period was tolled,[6] the prosecution of the robbery committed in 1995 was commenced outside of the three-year period, and defendant's motion to dismiss or vacate his conviction on count 13 should have been granted.

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case interpreting former section 1070, and its provision of additional peremptory challenges when "the offense charged be punishable with death, or with imprisonment in the state prison for life." The defendant, who was charged with robbery and an allegation under former 667 that he had a prior conviction, claimed he was entitled to the additional challenges. In a single-page opinion the court agreed, noting in part that under the sentencing scheme then in effect, a "*subsequent offense, robbery*, is punishable by imprisonment for life in the State Prison, at the discretion of the Court, under Section 213 of the Penal Code." (*Id*. at p. 137.) The Attorney General reasons that this case illustrates that any punishment imposed upon habitual offenders should be considered as the punishment for the offense whenever a statute applies to an offense punishable by death or life in prison. We cannot make such a leap, especially because the comment to section 799 specifically notes that "habitual offender" enhancements are to be disregarded in determining whether the maximum penalty for a crime is life imprisonment. Instead, we find persuasive the much more recent decision of our Supreme Court in *Thomas, supra*, 21 Cal.4th 1122, which construes similar statutory language to that appearing in section 799 as applied to the same sentencing scheme involved in this case, i.e., the Three Strikes Law.

[6] See footnote 4, *ante*.

II.

Denial of the Motion to Suppress

Defendant next contends that the court erred by denying his motion to suppress evidence, consisting of photographs of the inside of defendant's trailer, a glass pipe, and a white string, seized in a warrantless search of his trailer after the September 29 assault on Jane Doe 5. The search took place immediately after Jane Doe 5 identified defendant, who was standing outside his trailer. Officer Mikell took defendant into custody. Then, Officer Mikell and Doe 5 entered the trailer to retrieve items of her clothing. Officer Mikell observed a shoestring that matched her description of the string used to tie her up. Officer Dobie also entered the trailer and seized a white string, photographed a pair of Doe 5's sandals, a bag of clothing, and a glass pipe. Neither officer was aware of defendant's probation search condition.

The court denied the motion to suppress based upon its finding the warrantless entry was justified by exigent circumstances and the need to prevent destruction of evidence. The Attorney General concedes that these stated reasons were incorrect because defendant had already been arrested outside his trailer, eliminating any risk that he would escape, or destroy evidence, and there was no indication that anyone else remained inside. (See *Maryland v. Buie* (1990) 494 U.S. 325; *People v. Celis* (2004) 33 Cal.4th 667, 676; *People v. Larry A.* (1984) 154 Cal.App.3d 929, 934-936.) The Attorney General suggests that, despite the failure to raise the issue below, we may nonetheless uphold the denial of the motion to suppress because the police officers inevitably would have discovered defendant's probation search condition in the course of their normal booking procedures, after defendant was arrested. (See *Nix v. Williams* (1984) 467 U.S. 431, 444.) We need not reach this contention because we find any error in denying the motion to suppress was harmless under the *Chapman v. California* (1967) 386 U.S. 18, 24 standard.

The physical evidence found in the trailer was either essentially neutral on the key issue of consent, or cumulative of other evidence. As defendant acknowledges in his reply brief, Doe 5's account did not suggest that there would be much physical evidence

to corroborate her testimony that she was forcibly sexually assaulted, and there was not. The only physical evidence recovered in the search of the trailer that was introduced at trial, or referred to by testifying officers, consisted of photographs of the interior of the trailer, items of Doe 5's clothing, including her shoes, and white string found on the headboard of a bed in the trailer. Nothing in the photographs depicting the condition of the interior of the trailer corroborated Doe 5's testimony that the assault was forcible. The discovery of the string arguably provided some corroboration that Doe 5 was tied up, but was at best equivocal on the question whether this activity was consensual. Defendant argues that the discovery of clothing left behind in the trailer was "critical" corroboration of Doe 5's testimony because it supported the inference that she left the trailer abruptly, after being sexually assaulted. Yet, several police officers testified that Doe 5 was found in the alley near the trailer, upset and dressed only in lingerie and a trench coat. The introduction of the evidence that her clothing was recovered from the trailer therefore was merely cumulative of this testimony, which also supported the inference that she fled the trailer after a sexual assault.[7] For the foregoing reasons we conclude any error in the denial of the motion to suppress was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

III.

Denial of the Motion to Exclude Identification Based Upon Suggestive Photo Array

Defendant next contends that the trial court erred by denying his motion to suppress evidence of Doe 4's pretrial identification of him on the ground that the photographic lineup was unduly suggestive.

At the suppression hearing, Officer Cantrell testified that, on October 27, 1995, he contacted Jane Doe 4 at Kaiser Hospital in Richmond where she was hospitalized. She described her assailant as a "black male, approximately 6'2", 190 pounds, bald head or really shortcut, unshaven, and his left eye was missing or possibly messed up." She also

[7] The discovery of her clothing in the trailer would of course have been important had there been an issue of identification, but there was not, because the defense was that defendant and Doe 5 had consensual sex.

described her assailant as "[a]pproximately 30 to 35 years old, brown hair, brown eyes, really skinny, wearing dark colored top and blue jeans." Based upon the victim's description, Officer Cantrell compiled a photographic lineup, consisting of six pictures, including one of defendant. He attempted to find pictures of men who had "messed up or missing left eyes." Before showing the photo lineup to Doe 4 he admonished her that she should not allow the fact that a photo is shown to her to influence her judgment, or assume the assailant is depicted in one of the photos. He further advised her that she should not guess, that it just as important to free innocents as it is to identify the guilty, and she had no obligation to identify anyone. After viewing each of the photographs very carefully, Doe 4, pointed to defendant's photo and said, "[T]hat's him right there." Cantrell asked her to take another close look and make sure, whereupon she again identified defendant. The photo lineup was also submitted to the court. The trial court denied defendant's motion to suppress evidence of the identification because it found no "unwarranted suggestibility."

"A pretrial identification procedure violates a defendant's due process rights if it is so impermissibly suggestive that it creates a very substantial likelihood of irreparable misidentification." (*People v. Contreras* (1993) 17 Cal.App.4th 813, 819.) Impermissible suggestion is shown if the procedure "suggests in advance of a witness's identification the identity of the person suspected by the police." (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052.) Defendant argues that the photographic display was impermissibly suggestive because only his photograph clearly depicted a person whose left eye "is messed up, not just closed or partially closed."

Our independent review of the photographic lineup satisfies us that the photo lineup was not impermissibly suggestive. (*People v. Kennedy* (2005) 36 Cal.4th 595, 609.) "Because human beings do not look exactly alike, differences are inevitable." (*People v. Carpenter* (1997) 15 Cal.4th 312, 367.) "[T]he crucial issue is whether [defendant] has been singled out and his identification made a foregone conclusion under the circumstances." (*People v. Faulkner* (1972) 28 Cal.App.3d 384, 391, disapproved on other grounds in *People v. Hall* (1980) 28 Cal.3d 143, 157, fn. 8 & *People v. Bustamante*

(1981) 30 Cal.3d 88, 102.) The photographs all depicted black males of generally the same age and build, with similar hair length. Moreover, contrary to defendant's characterization, several of the other photos depict individuals with some kind of left eye defect. In addition to picture 5, depicting defendant, the subject of picture 1 appears to have a walleye; the subject of picture 4 has a left eye that is partially closed; and the subject of picture 6 has a slightly droopy left eyelid. The subjects of photos 2 and 3 have their eyes closed. " '[T]here is no requirement that a defendant in a lineup must be surrounded by people nearly identical in appearance.' " (*People v. Blair* (1979) 25 Cal.3d 640, 661.) We find no significant disparities in appearance that would have singled defendant out and made identification of his photo a foregone conclusion. The trial court therefore correctly denied the motion to suppress the pretrial identification of defendant from this photo array.

IV.

Denial of the Motion to Dismiss 1995 Offenses Based on Preaccusation Delay

Despite the fact that defendant had been identified in connection with the assaults in 1995, the information alleging the offenses involving Does 4 and 5 was not filed until August 2001. Defendant contends that the court should have granted his motion to dismiss the offenses involving Does 4 and 5 because the preaccusation delay resulted in prejudice to him, and dismissal was the appropriate remedy to avoid a violation of his due process right to a fair trial.

In *People v. Catlin* (2001) 26 Cal.4th 81, 107, our Supreme Court explained that "[d]elay in prosecution that occurs before the accused is arrested or the complaint is filed may constitute a denial of the right to a fair trial and to due process of law under the state and federal Constitutions. A defendant seeking to dismiss a charge on this ground must demonstrate prejudice arising from the delay. The prosecution may offer justification for the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay. [Citations.] A claim based upon the federal Constitution also requires a showing that the delay was undertaken to gain a tactical advantage over the defendant. [Citations.] We have observed that '[p]rejudice

may be shown by loss of material witnesses due to lapse of time [citation] or loss of evidence because of fading memory attributable to the delay.' [Citation.]" (*Id.* at p. 107.)

If prejudice is shown, the court must weigh the prejudice to the defendant resulting from delay against the justification for the delay. (*People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 915.) "Even a minimal showing of prejudice may require dismissal if the proffered justification for delay is insubstantial. By the same token, the more reasonable the delay, the more prejudice the defense would have to show to require dismissal. Therein lies the delicate task of balancing competing interests." (*Ibid.)*

The trial court ruled that, assuming arguendo defendant had met his burden of showing prejudice, his showing was relatively weak, and was outweighed by the showing of justification for the delay. We agree, and shall conclude that the preaccusation delay did not deprive defendant of due process and a fair trial.

With respect to the counts involving Doe 4, defendant demonstrated that there was a witness, Latasha Collie, who could have provided a partial alibi, and he documented the defense investigator's unavailing efforts to find her. According to Officer Cantrell, when he went to the trailer to arrest defendant in 1995, a woman named Latasha Collie was present and stated she had been with defendant from October 15, 1995, through October 27, 1995, and had been with him "almost all day." Defendant failed to establish, however, whether Collie's statement that she had been with defendant "almost all day" referred only to October 27, 1995, which was only the day Doe 4 escaped, or every day between October 15, 1995, and October 27, 1995. Under either construction of Collie's statement, however, the fact remains that she did not state she had been with defendant at all times, but only "almost all day." Therefore, at best, she could only have provided a partial alibi. It is not likely this partial alibi witness would have had an impact on the outcome of the case, in light of the strength of the victim's identification of defendant from the photo lineup, and later at trial, the accuracy and detail of her description of her assailant and the trailer where the assaults occurred, and the evidence tying defendant to that trailer, including the victim's reference to having to seen the name "Edward" on the

wall. Therefore, defendant's showing of prejudice with respect to the offenses involving Doe 4 was, at best, minimal.

With respect to Doe 5, defendant's showing of prejudice was even weaker. Apparently, defendant's theory of prejudice was that witnesses had existed who could have testified that Doe 5 was a working prostitute, and this evidence would have supported his defense that the acts were consensual. Yet, he did not identify any particular witness who could no longer be found. Nor did he present evidence of efforts to find such witnesses in support of this motion.[8] In the absence of more specific evidence that Doe 5 was working as a prostitute the night the offenses allegedly occurred, and went to defendant's trailer pursuant to an agreement to perform an act of prostitution, evidence that Doe 5 worked as a prostitute would have had little probative value on the issue of her consent to the acts committed that night. Moreover, it is not likely that testimony that she was a working prostitute would have affected the outcome in light of other overwhelming evidence belying consent, such as the victim's flight in nothing but lingerie, and the police testimony describing her state of agitation immediately after escaping. (See *People v. Butler* (1995) 36 Cal.App.4th 455, 464 [mere loss of potential witnesses was insufficient showing of prejudice unless testimony would have reasonable likelihood of affecting outcome of trial].)[9]

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[8] Defendant did introduce some evidence at trial of efforts to find defense witnesses, including Latasha Collie, but this evidence was not before the court when it ruled on the motion to dismiss.

[9] Defendant also asserted he was prejudiced by the preaccusation delay because he was prosecuted in July 1996 for failing to register as a sex offender, and for sexual assault, and was convicted and sentenced to state prison on those charges. He argued that if the charges involving Does 4 and 5 had been filed then, he could have benefited from concurrent sentencing. The court determined that this alleged prejudice would be better remedied by considering the contention as a factor in sentencing if he were convicted, rather than by dismissing the charges. Although defendant contends the court never did revisit the issue at sentencing, he does not provide any citation to the record where he raised the issue, or objected to the failure of the court to "revisit" it. We therefore deem the contention waived.

Weighed against this weak showing of prejudice was a strong showing of justification for the delay, i.e., the refusal of the victims to cooperate with the investigation of the offense. Detective Gagan testified that in the course of investigating the May 2001 incident he did a records check and saw that defendant had been a suspect in several other crimes involving a similar modus operandi, including the two cases in 1995 involving Doe 4 and Doe 5. He also found a 1996 case involving a Jane Doe 3. He decided to investigate why charges involving offenses against Doe 4 had not been filed. In the original file he found a note, apparently from Doe 4, stating she was afraid of defendant and did not want to pursue the charges.

Detective Gagan asked two officers to contact Doe 4, and have her come to his office for an interview. When he met with her, she continued to express her view that the police could not protect her. Gagan learned of at least two incidents of intimidation she had reported, and based upon these incidents, he was able to get her in the victim relocation program. She then became cooperative and willing to participate in the prosecution.

With respect to Doe 5, Gagan also reviewed the original police file. Gagan testified that the detective assigned to the case in 1995 made two attempts to contact Doe 5, who was homeless, through her mother. She promised to give Doe 5 the detective's telephone number, and have her call. In the second contact, she stated Doe 5 had said she did not intend to return the call to make a report. The detective assigned to the case in 1995 concluded that the case should be closed because of the victim's refusal to cooperate with the investigation.

In light of the refusal of either Doe 4 or Doe 5 to cooperate with the investigation, the Richmond police did not submit the cases to the district attorney to consider for prosecution. The failure of a key witness to cooperate is a valid investigative reason for delay in bringing charges because, although a prosecutor might be able to obtain a conviction under such circumstances, that possibility is certainly diminished.

Defendant nonetheless argues that the showing of justification for the delay was not adequate, and did not outweigh the prejudice it caused, because the same steps taken

by Gagan to obtain the cooperation of Doe 4 and 5 could have been taken earlier when defendant was prosecuted for other sex offenses in 1996.[10] With respect to Doe 5 he also suggests that the police simply gave up too easily after only two contacts with her mother, because when Gagan finally did seek her out again in 2001, she responded and cooperated. Yet, he offered nothing but pure speculation that the measures Gagan took to secure the cooperation of these victims would have been successful had they been taken in 1996. There was no evidence that Doe 4 would have been eligible for, or willing to enter, a witness protection program, or that one existed at that time. In light of the notation in the file that Doe 5 had affirmatively stated her intention not to call and cooperate with the detective, further attempts to contact Doe 5 would likely have been futile. Any number of other factors in the intervening years could have played a role in the willingness of these victims to cooperate. We decline to find a due process violation based merely upon speculation that the cooperation of Does 4 and 5 might have been obtained sooner. "The due process clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment. Rather, the task of the reviewing court is to determine whether precharging delay violates the fundamental conceptions of justice, which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency. Prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt." (*People v. Dunn-Gonzalez, supra*, 47 Cal.App.4th at p. 914.) Significantly, the trial court found that the delay was not intentional, and did not occur for the purpose of obtaining a tactical advantage. Gagan's testimony amply supports that finding. There was simply no evidence at all that, in 1996, the prosecution was aware of the closed police files on Doe 4 and Doe 5, and intentionally did not pursue those charges. It was not until May 2001 that Gagan discovered the files and their similarity to

[10] Detective Gagan also asked the officers to contact Doe 5. They succeeded, and she responded by meeting him in person.

charges he was investigating, and he turned them over to the district attorney for prosecution as soon as he was able to secure the cooperation of the witnesses.

For the foregoing reasons, the court properly concluded that defendant's minimal showing of prejudice was outweighed by the justification for the delay, and denied the motion to dismiss the offenses committed against Does 4 and 5. (See *People v. Catlin, supra,* 26 Cal.4th at p. 107.)

V.

Denial of the Motion to Sever

The court denied defendant's pretrial motion to sever the counts involving Does 4 and 5. Defendant does not dispute that the statutory requirements for joinder were met. He nonetheless contends the court abused its discretion in denying the motion because the potential prejudice to defendant outweighed the state's interest in the efficiency of a joint trial. (See *People v. Ochoa* (1999) 19 Cal.4th 353, 408; *People v. Bean* (1988) 46 Cal.3d 919, 935-936.)

The factors the court must consider in exercising its discretion with respect to a motion to sever are: "(1) [T]he cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense . . . ." (*People v. Mendoza* (2000) 24 Cal 4th.130, 161.)

Cross-admissibility is not a prerequisite to a joint trial, nor is complete cross-admissibility necessary to justify joinder. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1284.) Nonetheless, a finding of cross-admissibility dispels any inference of prejudice. (*People v. Mayfield* (1997) 14 Cal. 4th 668, 721). The court determined that the evidence of the offenses defendant sought to sever was cross-admissible. Defendant argues that the evidence of his crimes involving Doe 4, at least, were not cross-admissible pursuant to Evidence Code section 1108 because the charged offenses were not sexual. He is correct that defendant was not alleged to have committed a sexual act upon Doe 4, but

ignores the fact that the information specifically alleged that he kidnapped her *with the intent to commit rape*.[11] Moreover, the court was also apprised of the fact that there would be evidence that defendant ordered Doe 4 to remove all her clothes, stated that he was going to have sex with her, but was thwarted by her escape.

Nor is there any merit to defendant's assertion that the court's finding of cross-admissibility failed to consider whether, even if otherwise admissible under Evidence Code section 1108, the evidence concerning Does 4 and 5 would be excluded pursuant to Evidence Code section 352 because these offenses were the most remote, the charges against Doe 5 were the weakest, and there would be no need to introduce evidence of the crimes against Does 4 and 5 in separate trials because the prosecution had other evidence of uncharged offenses it could introduce. The record shows that the court was well aware that in order to find the evidence to be admissible under Evidence Code section 1108, it also had to weigh the probative value of such evidence against the potential prejudice. It specifically found that the probative value of such evidence outweighed any prejudice.

In addition to cross-admissibility, most of the other relevant factors weighed in favor of denying severance: Nothing about the offense alleged against Does 4 and 5 was more or less inflammatory than the forcible sex offenses, beatings, and imprisonment committed against the other Does. Except for the fact that the offenses involving Does 4 and 5 were older, and that there was some minor physical corroboration of some of the other victims' testimony, the cases involving Does 4 and 5 were not significantly weaker. For the foregoing reasons, we conclude the court did not abuse its discretion by denying the motion to sever.

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[11] Because we examine the record before the trial court at the time of its ruling to determine whether the court abused its discretion in denying the severance motion (*People v. Price* (1991) 1 Cal.4th 324, 388), the validity of the court's rationale for finding cross-admissibility at the stage of the pretrial motion to sever is not undermined by the jury's ultimate verdict acquitting defendant of the charged offense of kidnapping with intent to commit rape, and conviction instead of the lesser included offense of simple kidnapping.

VI.

Admission of Uncharged Offenses

Over defendant's objection the court admitted the following evidence of uncharged sexual offenses committed against two other victims, Jane Doe 6 and Jane Doe 7, pursuant to Evidence Code section 1108.

The evidence with respect to Doe 6 was that, on August 16, 1993, defendant was convicted, based upon his plea, of assault with intent to commit rape. Doe 6 had been a friend of defendant's for many years. She went to defendant's house because he was going to help her with some Social Security documents. Instead of helping her, defendant drank alcohol and consumed drugs. When Doe 6 rebuffed his sexual advances, he suddenly became violent. He punched her and ordered her to take off her clothes. He ordered her to orally copulate him and attempted sexual intercourse. He held her captive until the next morning when she was able to escape after defendant passed out. She immediately reported the attack to the police. Photographs were taken of the injuries, which included the need for stitches in her mouth.

Jane Doe 7 testified that in 1998 or 1999 she met defendant in the park and agreed to perform an act of prostitution. They went to his trailer and smoked crack cocaine. She insisted that defendant use a condom, but defendant interrupted intercourse to remove it. She told him no, but he held her down and had sex with her without a condom. She kicked him in the testicles and escaped. Doe 7 reported the incident to a police officer that same day, but she was not sure whether he took a report, and she never followed up on the matter. At the time of trial she was in custody on a warrant for prostitution.

Defendant first contends that admission of the evidence of these uncharged offenses pursuant to Evidence Code section 1108 is a violation of his due process rights, and a violation of equal protection. In *People v. Falsetta* (1999) 21 Cal.4th 903, 916-920, our Supreme Court held that the requirement in Evidence Code section 1108, that the court consider whether the uncharged acts should be excluded pursuant to Evidence Code section 352, adequately secures the defendant's due process rights. Although the court in *Falsetta*, *supra*, was not faced with an equal protection challenge to Evidence Code

section 1108, it did cite with approval the analysis in *People v. Fitch* (1997) 55 Cal.App.4th 172, 184-185, that explained the legislative rationale for distinguishing between sex crimes and other types of offenses. (*People v. Falsetta*, *supra*, at p. 918.) We find the reasons stated in *People v. Fitch, supra*, at pp. 184-185, for rejecting an equal protection challenge to section 1108 to be persuasive, and need not repeat them here. (Accord *People v. Waples* (2000) 79 Cal.App.4th 1389, 1394-1395 (*Waples*) [Evid. Code, § 1108 does not violate equal protection].)

Defendant further contends that even if Evidence Code section 1108 is not unconstitutional, the court abused its discretion by failing to exclude it pursuant to Evidence Code section 352. "By reason of [Evidence Code] section 1108, trial courts may no longer deem 'propensity' evidence unduly prejudicial per se, but must engage in a careful weighing process under [Evidence Code] section 352." (*People v. Falsetta, supra,* 21 Cal.4th at pp. 916-917; see also *People v. Harris* (1998) 60 Cal.App.4th 727, 737-739.) Defendant argues the uncharged offenses were too dissimilar from the charged offense, and too remote. He also asserts that the prejudicial effect outweighed the probative value because the prosecutor already had evidence of the charged offenses involving four different victims over a span of several years.

The court properly considered the relevant factors, and did not abuse its discretion in concluding the probative value of this evidence outweighed the potential prejudice. The evidence of the uncharged offenses was relevant, and had significant probative value on the key issue of consent. The defense consisted largely of an attack on each victim's credibility. Many of the victims were prostitutes, had substance abuse problems, and had prior felony convictions involving moral turpitude. Thus, evidence of defendant's prior uncharged sexual offenses was highly relevant to rebut the defense attempt to paint the current victims as liars, motivated to make false charges against defendant because of disputes over drugs or payment for acts of prostitution. (*Waples, supra,* 79 Cal.App.4th 1389, 1395.)

The uncharged offenses were also sufficiently similar: In the assault on Doe 6, defendant brutally beat, sexually assaulted and imprisoned his victim just as he did with

Does 1, 2, and 4.[12] The assault on Doe 7 was similar to the charges involving Doe 1, in that the victim was a prostitute, and he forced her to submit to sexual intercourse without a condom. Nor were these uncharged offenses committed in 1993 and 1998-1999 too remote to be probative. (See, e.g., *People v. Branch* (2001) 91 Cal.App.4th 274, 285 [30-year-old crimes were not too remote]; see also *Waples, supra,* 79 Cal.App.4th at p. 1395 [18- to 30-year-old crimes].)

The effect of the admission of the uncharged offenses was not merely cumulative of the testimony of the multiple victims of the charged offenses because defendant had been *convicted* of the uncharged offenses against Doe 6, which made the probative value of this evidence particularly high. The only other possible prejudice defendant identifies is the risk that the sheer number of victims might increase the likelihood of a conviction because of confusion, or the inference that it was unlikely that *all* of them would lie. Yet, the charges for which defendant was on trial already involved four different victims. It therefore was not likely that evidence of two more would significantly increase these risks inherent in the proper joinder of the offenses involving Does 1, 2, 4 and 5.

VII.

Unavailability of Doe 2 to Testify at Trial

Defendant next contends that the court erred in concluding that Doe 2 was unavailable to testify at trial, and allowing the prosecution to have her preliminary hearing testimony read as former testimony. (Evid. Code, § 1291.) On review, we must apply a deferential standard of review to the trial court's factual findings, and an independent standard as to whether the historical facts, as found by the trial court amounted to due diligence. (*People v. Cromer* (2001) 24 Cal.4th 889, 900.)

"Due diligence" is not susceptible to a mechanical definition, but "connotes persevering application, untiring efforts in good earnest, efforts of a substantial character." (*People v. Sanders* (1995) 11 Cal.4th 475, 523.) Whether due diligence is shown depends upon the totality of efforts used to locate the witness. (*Ibid.*) Relevant

[12] Although defendant did not sexually assault Doe 4, he threatened to do so, and he did hold her captive and brutally beat her.

considerations include the character of the proponent's efforts; whether the search was timely begun; the importance of the witness's testimony; whether leads were competently explored; whether the proponent of the evidence reasonably believed prior to trial that the witness would appear willingly; and whether the witness would have been produced if reasonable diligence had been exercised. (*People v. Cromer, supra,* 24 Cal.4th at p. 904.)

This court "will not reverse a trial court's determination simply because the defendant can conceive of some further step or avenue left unexplored by the prosecution. Where the record reveals . . . that sustained and substantial good faith efforts were undertaken, the defendant's ability to suggest additional steps (usually, as here, with the benefit of hindsight) does not automatically render the prosecution's efforts 'unreasonable.' [Citations.] The law requires only reasonable efforts, not prescient perfection." (*People v. McElroy* (1989) 208 Cal.App.3d 1415, 1428, disapproved on another point in *People v. Cromer, supra,* 24 Cal.4th at p. 901, fn. 3.) "That additional efforts might have been made or other lines of inquiry pursued does not affect [a] conclusion [there was due diligence]. [Citation.] It is enough that the People used reasonable efforts to locate the witness." (*People v. Cummings, supra,* 4 Cal.4th at p. 1298.)

The evidence at the hearing on Jane Doe 2's unavailability demonstrated the requisite sustained and substantial good faith efforts: The subpoena clerk testified that there had been five trial dates and she had mailed subpoenas to Doe 2's last known address for each one. Service was successful for the third trial date in 2002. That subpoena was sent to Santa Rita jail, where Doe 2 was then being detained. The others, which were sent to the mother's address, did not result in any response from Doe 2 by telephone or mail. The fourth subpoena was served in July 2003. The clerk served a subpoena for the most recent trial date on November 3, 2003. The clerk had also called several local hospitals, the coroner's office, and the California Department of Corrections in an effort to locate Doe 2. An investigator also determined that she was not in the custody of the Department of Corrections.

Sergeant Gagan testified that, when Doe 2 testified at the preliminary hearing in July and August 2001, he reconfirmed her contact information, consisting of her mother's address and telephone number. On October 31, 2003, he contacted Doe 2's mother, who stated she only had sporadic contact with Doe 2, but promised she would relay the message that Sergeant Gagan was looking for Doe 2. He next contacted Doe 2's court-appointed advocate, who had assisted Doe 2 at the preliminary hearing. She was unable to provide Doe 2's current location, but said she would contact several family members to see what information they could provide. When Sergeant Gagan checked back with her a few days later, she told him her efforts had been unsuccessful. Gagan contacted the jail facilities for Alameda, San Francisco, Contra Costa, and Solano counties. He further searched the booking information on Doe 2 kept by the Fremont, Hayward, and Oakland police departments. He found an address in Oakland listed for Doe 2, but determined the address was not current. He checked her driver's license records, which only disclosed the mother's address he already had. He also checked the drug rehabilitation center where she had been a patient, but that source did not provide any useful information on her current whereabouts. He went to the area that Doe 2's mother said she frequented, and asked dozens of women he believed would know, or recognize, Doe 2 whether they knew where he might find her. This effort produced one possible address, but Gagan determined the woman residing at that address resembled, but was not, Doe 2. He met with Doe 2's mother again on November 12. He went through the mother's personal telephone book page by page discussing each friend or relative who might know where Jane Doe 2 was. The mother finally informed Sergeant Gagan that Doe 2 was homeless, using drugs, and was avoiding contact with anyone because she had a warrant out for her arrest. Gagan later confirmed that there was an outstanding warrant.

The foregoing facts demonstrate that the prosecution made exhaustive and sustained good faith efforts to locate Doe 2 over an approximate two-week period. Defendant nonetheless argues that these efforts were inadequate because not timely begun. He asserts that the prosecution should have begun its efforts much earlier because it knew that Doe 2 was a drug addict who lived a transient lifestyle and would be difficult

to locate. He further suggests that the likelihood the prosecution could have secured her presence at trial if it had started to search for her sooner is supported by the fact that *after* the trial, the probation department, in the course of preparing its report for sentencing, was able to contact Doe 2 for the purpose of obtaining a victim's statement. We review the court's ruling based upon the evidence before it at the hearing and cannot consider the subsequent fortuity that the probation officer later succeeded in contacted Doe 2. A court cannot "properly impose upon the People an obligation to keep 'periodic tabs' on every material witness in a criminal case, for the administrative burdens of doing so would be prohibitive." (*People v. Hovey* (1988) 44 Cal.3d 543, 564; see also *People v. Wilson* (2005) 36 Cal.4th 309, 342 [citing *Hovey*].) That burden would be even heavier where, as here, the witness is homeless and leads a transient lifestyle. Moreover, there was evidence that the witness was actively avoiding contacts with the police or anyone she knew due to an outstanding warrant. In light of these circumstances, the efforts of the prosecution would not have been any more successful had it begun the process of trying to locate her earlier.

VIII.

Conflict of Trial Counsel Arising From the Motion to Recuse the District Attorney's Office

Defendant next argues that his counsel had a conflict representing him with respect to the motion to recuse the district attorney's office, and that the conflict adversely affected counsel's performance not only on the motion to recuse, but also the remainder of the trial.

Defendant originally made the motion to recuse the district attorney's office during a period of self-representation,[13] but by the time the motion was heard, defendant was represented by Mr. Jameson of the alternate defender's office. Defendant claimed that

[13] Defendant had filed a form motion to recuse the entire district attorney's office on the grounds that he intended to call "one or more members of the prosecutor's office as a material witness." The written motion was not accompanied by any affidavits, and provided no information regarding the issue on which a member of the district attorney's office would be called to testify.

the entire district attorney's office should be recused because he intended to call some members as witnesses in support of his contention that the district attorney had failed to comply with, and had tampered with transcripts showing, the terms of the 1993 plea involving Jane Doe 6. Defendant believed that the terms of that plea should have resulted in dismissal of the section 220 count and reduction of a section 245 felony to a misdemeanor. On the merits of the motion, the court ruled that defendant had failed even to make an adequate prima facie showing requiring a response, and denied the motion.[14]

Defendant contends that a conflict arose in the context of the recusal motion because defense counsel told defendant he "could not subpoena certain witnesses that he wanted . . . because they were attorneys in my office." Defendant further asserts that the court was put on notice of the conflict when defense counsel advised the court that he was willing to present the motion defendant had filed in propria persona, but that he had informed defendant he could not subpoena these witnesses because he considered "that to be a conflict." Defendant argues that this statement triggered the duty of the court to inquire into the possibility of a conflict and, if necessary, obtain defendant's informed waiver. (See *People v. Jones* (1991) 53 Cal.3d 1115, 1136; *People v. Clark* (1993) 5 Cal.4th 950, 994-999.) He further contends reversal of all of his convictions is required because the court failed to conduct an inquiry and the conflict adversely affected counsel's performance, not only on the motion, but also the rest of the trial.

When a court " 'knows or reasonably should know that a particular conflict exists,' " it has a duty to inquire into the conflict even in the absence of objection by defendant or his or her counsel. (*Mickens v. Taylor* (2002) 535 U.S. 162, 168; *People v. Bonin* (1989) 47 Cal.3d 808, 836.) The duty to inquire is not triggered merely because of "a vague, unspecified possibility of conflict." (*Mickens v. Taylor, supra,* at p. 169.) Moreover, after some inquiry, the court may decline to pursue the matter if the potential for conflict is too slight. (*People v. Bonin, supra,* at p. 837.)

[14] Defendant does not seek review of the merits of the court's denial of his motion to recuse the district attorney's office.

We question in the first instance whether defense counsel's comment was even an indication of a potential or actual conflict sufficient to trigger the duty to conduct some inquiry. We understand counsel to have been explaining that the reason he told defendant he would not subpoena witnesses from his own office was that, *if he did,* a conflict would be *created,* and therefore that he had *avoided* a conflict by declining to subpoena them. Assuming arguendo that the duty to inquire was triggered, the court performed its duty. It asked for confirmation from counsel that the same evidence "could be presented by way of Mr. Turner if need be," and defense counsel agreed that was "correct." Nor was there any offer of proof, or other indication of who the witnesses were, or that they could testify to facts that would have supported defendant's claim. Moreover, the court ascertained defendant had unsuccessfully made the claim that the charges should have been reduced or dismissed in an appeal and petition for a writ of habeas corpus, and that this court found the terms of the pleas did not require automatic dismissal. In the absence of some indication that the witnesses in defense counsel's office could actually provide testimony in support of defendant's claim, that the same facts could not be established by another means, and that the claim itself had merit, the existence of a potential or actual conflict was supported by nothing more than speculation. The court therefore satisfied itself that any potential or actual conflict was too slight to require further inquiry. We agree that the conflict "was so remote and tenuous that it did not require the court to inquire further than it did." (*People v. Cornwall* (2005) 37 Cal.4th 50, 76 [duty to inquire fulfilled where court asked about defense counsel's prior representation of the wife of a prosecution witness, and defendant merely argued counsel "might" have received confidential information that he could not reveal but which could have been useful in the present case].)

IX.

Denial of the Motion for Continuance

During trial, defendant sought a continuance to secure the presence of a witness, Ronald Brown. The court heard testimony in support of the motion on the seventh day of the trial. Defense investigator John Beaudin testified that he had started looking for

Brown one week earlier, and that, the preceding day, he had located Brown in custody at the Vacaville Medical Facility. Defense counsel initially represented that Brown would testify that he "was in the park at the time of the Jane Doe 1 incident," and that "Jane Doe 1 came back after being with Mr. Turner and smoked cocaine with him and Mr. Brown and bragged about having an affair with Mr. Turner." The court did not immediately rule on the motion. Four days later, defense counsel made a revised offer of proof. He stated: "I don't know exactly what he is going to say. But I was informed he was in the park on the day of the incident with regard to Jane Doe 1 and would be able to testify she is a prostitute and a liar." Defense counsel stated he had not taken steps toward obtaining a removal order, and that process would take approximately two weeks. The court denied the motion noting that Ronald Brown's testimony that Jane Doe 1 was a prostitute was cumulative of other evidence, and although relevant, his opinion that she is a liar was not so crucial to the defense that it warranted a two-week delay of the trial.

" ' "The granting or denial of a motion for continuance in the midst of a trial traditionally rests within the discretion of the trial judge who must consider not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion." ' [Citations.] In the absence of a showing of an abuse of discretion and prejudice to the defendant, a denial of his or her motion for a continuance does not require reversal of a conviction." (*People v. Samayoa* (1997) 15 Cal.4th 795, 840.)

An important factor in the exercise of discretion to grant a continuance is whether the evidence is material, because evidence that is cumulative or only has slight probative value is unlikely to affect the outcome, and the slight benefit is outweighed by the burdens associated with delay. (*People v. Beeler* (1995) 9 Cal.4th 953, 1003.) Jane Doe 1 had already testified that she was a "known prostitute," and had been impeached with two convictions for petty theft, and two convictions for prostitution. The court therefore was well within its discretion, based upon the revised proffer that Brown would

testify that Doe 1 was a liar and a prostitute,[15] to conclude that the testimony was cumulative of other evidence and was of insufficient material value to warrant a two-week continuance. (See *People v. Grey* (1960) 180 Cal.App.2d 683, 688.)

X.

CALJIC No. 2.50.01

The court instructed the jury on consideration of the uncharged sexual misconduct evidence in accordance with CALJIC No. 2.50.01. To preserve the issue for purpose of federal review, defendant contends that this instruction violates his right to due process and a fair trial. As defendant acknowledges, in *People v. Reliford* (2003) 29 Cal.4th 1007, our Supreme Court rejected the same constitutional challenge to the 1999 revision of CALJIC No. 2.50.01, and in dicta described the 2002 revision as an improvement upon the 1999 revision. (*Id.* at pp. 1012-1016.) It noted the 2002 revision "provides additional guidance on the permissible use of the other-acts evidence and reminds the jury of the standard of proof for a conviction of the charged offenses." (*Id.* at p. 1016.) Although not directly controlling, we are persuaded by this dicta, and the holding in *Reliford, supra,* that the 2002 revision of CALJIC No. 2.50.01 does not violate defendant's due process rights, or his right to a fair trial. (See *People v. Brown* (2000) 77 Cal.App.4th 1324, 1336.)

XI.

CALJIC No. 2.21.2

Also for the sole purpose of preserving the issue for federal review, defendant contends the reference, in CALJIC No. 2.21.2, to "probability of truth" in giving guidance on how to assess the credibility of a witness who is willfully false in a material

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[15] Defendant asserts that the court misunderstood the complete proffer and that defense counsel intended the proffer at the second hearing merely to supplement, not replace, his prior proffer. Yet the court expressly based its ruling only upon the most recent offer of proof. If that was incorrect or a misunderstanding of defense counsel's proffer, then it was incumbent upon counsel to correct that mistake at the time of the ruling. In the absence of any objection or attempt to correct the court's understanding of defense counsel's proffer we can only assume that the court accurately understood that defense counsel had revised it.

part of his or her testimony, permits jurors to resolve issues of credibility by a preponderance standard. The contention has been consistently rejected by our Supreme Court. (See *People v. Nakahara* (2003) 30 Cal.4th 705, 714; *People v. Hillhouse* (2002) 27 Cal.4th 469, 493; *People v. Riel* (2000) 22 Cal.4th 1153, 1200; & *People v. Beardslee* (1991) 53 Cal.3d 68, 94.)

XII.

Prosecutorial Misconduct

Defendant next argues that the court abused its discretion by failing to declare a mistrial after the prosecutor hugged two of the victims in front of the jury. The first incident occurred after Doe 4 left the witness stand and hugged the district attorney on her way out. Defense counsel objected, and later stated that he had been informed that the prosecutor also had hugged Doe 5 in front of the jury. The prosecutor stated that both incidents were unsolicited, unexpected acts by the witnesses. Defense counsel requested an admonition. The court agreed that this should not have occurred and admonished the jurors to disregard these contacts between the witnesses and the prosecutor. Defendant argues that hugging the witnesses was the equivalent of the prosecutor vouching for the credibility of the witnesses, and that it was incumbent upon the prosecutor, especially after the first witness hugged her, to ensure that the witnesses did not engage in such conduct in front of the jury.

" 'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214. Under state law, prosecutorial misconduct is found only if the conduct involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

In denying the motion for a mistrial, the court stated, among other things, that its own observations were consistent with the prosecutor's assertion that these were spontaneous acts initiated by the witnesses after giving highly emotional testimony. The prosecutor's only alternative would have been to shrug off or resist the hug, which could

have carried its own set of unintended messages to the jury. We fail to see how this brief spontaneous human interaction qualifies as "egregious" and "intemperate behavior" (*People v. Gionis*, *supra*, 9 Cal.4th at p.1214) or a "deceptive or reprehensible method" (*People v. Espinoza*, *supra*, 3 Cal.4th at p. 820) to influence the jury. Moreover, although the hugging incidents are at least arguably susceptible of the interpretation that the prosecutor believed the witnesses' testimony, the act of hugging was too equivocal to qualify as vouching for their credibility. The hugs could equally have been understood by the jury as an expression of gratitude to the prosecutor, or simply an expression of relief that the difficult testimony was over. In any event, the possibility that the jury might infer from this equivocal conduct that the prosecutor was vouching for the credibility of these witnesses was not so overwhelming that the potential prejudice could not be cured by the appropriate admonition. The court gave such an admonition, at defense counsel's request, and expressly directed the jury to "disregard that conduct." "We assume the jury abided by the court's admonitions and instructions, and thereby avoided any prejudice." (*People v. Stitely* (2005) 35 Cal.4th 514, 559.)

XIII.

Sua Sponte Duty to Conduct a *Marsden* Inquiry

Defendant filed a handwritten motion for a new trial that raised, among other things, claims of ineffective assistance of counsel. He contends the court had a sua sponte duty to conduct a *Marsden* hearing (*People v. Marsden* (1970) 2 Cal.3d 118), and appoint substitute counsel to represent defendant on this motion.

Although under some circumstances the trial court may, upon request, have a duty to conduct an inquiry into counsel's competence and appoint substitute counsel to represent the defendant on a motion for a new trial based upon ineffective assistance of counsel, the trial court has no duty to conduct such an inquiry sua sponte. (*People v. Gay* (1990) 221 Cal.App.3d 1065, 1070 (*Gay*).) There must be a request for substitute counsel or "at least some clear indication by defendant that he wants a substitute attorney." (*People v. Lucky* (1988) 45 Cal.3d 259, 281, fn. 8.)

Defendant made no request for substitute counsel in writing, nor did he make any such request at the sentencing hearing when the court heard argument on the motion for a new trial. He also stood by, without objection, while his defense counsel argued the merits of the motion.[16] Nonetheless, defendant contends that a brief reference to *People v. Stewart* (1985) 171 Cal.App.3d 388, 393-396 (*Stewart*) (overruled on other grounds in *People v. Smith* (1993) 6 Cal.4th 684), in his handwritten points and authorities in support of the motion for a new trial, was sufficient to trigger the duty of the trial court to conduct a *Marsden* inquiry.

The mere reference to *Stewart* does not constitute a "clear indication" (*People v. Lucky*, *supra*, 45 Cal.3d at p. 281, fn. 8) that defendant wanted a substitute attorney to represent him on the motion for a new trial. The decision in *Stewart*, *supra*, itself held the procedures for appointment of substitute counsel on a new trial motion are triggered upon a *request* for substitute counsel. (*Stewart*, *supra*, 171 Cal.App.3d at pp. 393, 395.) Not only did defendant make no such request, his actions and those of his counsel at the hearing on the motion clearly conveyed that he *did not* seek appointment of substitute counsel. Defendant did not raise the issue in writing or orally at the hearing, and he made no objection when his defense counsel proceeded to argue the motion on the merits. Moreover, when the court inquired if there was "anything else" before it ruled on the motion, defendant *personally* responded that the matter was "submitted." The court then reviewed and denied the motion for a new trial. Defendant's appointed counsel continued to represent him for the purpose of sentencing, also without objection.

These facts are virtually indistinguishable from those in *Gay, supra*. In *Gay*, the defendant made a motion in propria persona for new trial based in part on claims of ineffective assistance of counsel. (*Gay, supra,* 221 Cal.App.3d at p. 1067.) In support of the motion he filed a handwritten motion detailing the inadequate defense, but he did not ask, in writing or at the hearing, for substitute counsel to prepare or argue the motion for new trial. (*Id.* at pp. 1067-1068.) He also did not object when his appointed counsel

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[16] Defense counsel declined to comment on the ineffective assistance of counsel claims.

argued sentencing issues on his behalf. (*Id.* at p. 1068.) The court held that the trial court had no duty to inquire into the adequacy of counsel's representation to determine whether to appoint substitute counsel. "A trial judge should not be obligated to take steps toward appointing new counsel where defendant does not even seek such relief." (*Id.* at p. 1070.)

We conclude defendant did not request substitute counsel to represent him on his motion for a new trial, and the court therefore had no duty to conduct a *Marsden* inquiry.

CONCLUSION

The judgment is affirmed, except for the conviction on count 13, which is reversed, and the matter is remanded for resentencing.

_____
STEIN, J.

We concur:

_____
MARCHIANO, P. J.

_____
MARGULIES, J.

Trial Court:	The Superior Court of Contra Costa County
Trial Judge:	Hon. Richard S. Flier
Counsel for Defendant and Plaintiff	Joseph Shipp Under appointment by the Court of Appeal First District Appellate Project, Independent Case System
Counsel for Plaintiff and Respondent	Bill Lockyer Attorney General of the State of California Robert R. Anderson Chief Assistant Attorney General Gerald A. Engler Senior Assistant Attorney General Eric D. Share Supervising Deputy Attorney General Dorian Jung Deputy Attorney General