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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. WILKINS GARCIA, Defendant and Appellant.	B262620 (Los Angeles County Super. Ct. No. TA132675)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura R. Walton, Judge. Remanded for resentencing.

Verna Wefald, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

Wilkins Garcia was convicted of a series of sexual offenses. On appeal, he alleges his due process rights were violated by the admission of evidence of uncharged sexual offenses, the exclusion from evidence of portions of a telephone call, and prosecutorial misconduct; he further argues that his convictions must be reversed due to cumulative error. The Attorney General contends that the trial court erroneously stayed a sentence enhancement under Penal Code[1] section 12022.3, subdivision (b). We affirm the convictions and but remand for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

Garcia was charged with a series of offenses against Eva P. A first trial ended in a mistrial when the jury could not reach a verdict, and the matter was retried. In the instant trial, by amended information, Garcia was alleged to have committed kidnapping to commit rape (§ 209, subd. (b)(1)) (count 1); forcible oral copulation in concert (§ 288a, subd. (d)(1)) (count 2); sexual penetration by a foreign object by acting in concert (§§ 264.1, subd. (a), 289, subd. (a)(1)(A)) (count 3); rape in concert (§§ 261, subd. (a)(2), 264.1) (count 4); and sodomy by use of force while acting in concert (§ 286, subd. (d)(1)) (count 5). Counts 2 through 5 also included special allegations that Garcia had kidnapped Eva P. within the meaning of section 667.61, subdivision (e); that he kidnapped Eva P. and that moving her substantially increased the risk of harm to her over and above that necessarily inherent in the underlying offenses, within the meaning of section 667.61, subdivision (d); and that he was armed with a knife within the meaning of section 12022.3, subd. (b).

Prior to trial, the prosecutor requested that two prior uncharged incidents of sexual assaults be admitted into evidence under Evidence Code sections 1108 and 1101, subdivision (b). These incidents involved different victims, both prostitutes, whom Garcia picked up on the street and then threatened with a knife and violently assaulted. Garcia objected that the incidents were dissimilar to the instant charged offenses because

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[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

in those instances the women were prostitutes and went with Garcia voluntarily; and he argued that the evidence of the uncharged acts was more prejudicial than probative under Evidence Code section 352. The court admitted the evidence of the uncharged offenses under Evidence Code section 1108, found the evidence more probative than prejudicial, and noted that the evidence would also be admissible under Evidence Code section 1101.

Eva P. testified that at approximately 7:00 or 8:00 p.m. on July 14, 2013, she was waiting at a bus stop in South Central Los Angeles when Garcia parked his car and approached her. Garcia grabbed her, held a knife to her throat, and told her that if she screamed he would kill her. At Garcia's instruction, Eva P. entered the backseat of the car, where another man was sitting. Eva P. followed their instructions to put her face toward that man's lap so that she could not see where the car was going.

After 10 or 15 minutes, Garcia stopped the car and the men brought Eva P. into a house. Garcia and the other man, Israel Pacheco, brought her into a bedroom and shut the door. Garcia told her to lie down on the bed and not to scream or yell. Fearing for her safety, Eva P. complied with Garcia's instruction to remove her clothing.

Through the night and into the next day, the men engaged in various sexual acts with Eva P. without her consent. First, Garcia placed his penis inside Eva P.'s vagina and his fingers in her anus while Pacheco placed his penis in her mouth. Eva P. described Garcia as "finish[ing]" with his penis in her vagina. After that the men alternated sexual assaults: Garcia would commit a sex act on Eva P., then Pacheco would take a turn, and then Garcia would assault her again. When asked how many times that routine was repeated, Eva P. answered, "It was more than 10 times." Garcia penetrated both her vagina and her anus with his penis and with his fingers. At some points Eva P. was on her back, at other times on her knees. Pacheco orally copulated her. Pacheco also attempted to penetrate her vagina but was unable to sustain an erection. Instead, he sat and used drugs while watching Garcia rape Eva P.

At one point Garcia went into the bathroom. Eva P. followed him there to beg him to release her, promising not to call the police. Garcia refused to let her go "until he was done with [her]." He told her to go back to the bed.

Eva P. estimated that Garcia raped her anally or vaginally approximately seven times while wearing condoms. When he exhausted his supply of condoms he continued without using a condom. Eva P. estimated that there were five to seven additional penetration incidents after Garcia discontinued condom use.

Garcia was aggressive and violent with Eva P, slapping her face two or three times. While Eva P. was on the bed, he choked her multiple times while instructing her to look at him and then to look away, although he did not squeeze her neck so hard that she could not breathe.

The next day Garcia let Eva P. go. Eva P. went to the hospital, underwent a rape examination, and spoke with the police. She sustained tears inside her vagina, anal lacerations, an abrasion on one breast, and bruises on her shins.

DNA extracted from swabs used on Eva P. during her sexual assault examination matched Garcia's DNA. Specifically, the sperm fraction of the anal swab and the major DNA profile from the sperm fractions of the vaginal swab, the external genital swab, and the vaginal lavage all matched Garcia. Swabs of her breasts and palms yielded DNA mixtures, and Garcia was a possible contributor to each mixture. Pacheco was also a possible contributor to the DNA taken from the swab of Eva P.'s left breast. Eva P. identified Pacheco in a photographic lineup.

Israel Pacheco was the man with Garcia during the kidnapping and sexual assault of Eva P.[2] Garcia and Pacheco were longtime friends who spent a lot of time together drinking and using drugs. On July 14, 2013, they had been drinking and smoking marijuana. Pacheco estimated that they had each consumed approximately five 40-ounce containers of beer when they left Pacheco's home to obtain more beer. After they purchased more alcohol, Garcia suggested they pick up prostitutes, and he told Pacheco not to be concerned that he did not have sufficient funds.

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[2] At the time of his testimony at Garcia's trial, Pacheco had already accepted a plea to a charge of forced oral copulation in concert, admitting that a knife was used in the commission of the offense. Pacheco had not yet been sentenced and acknowledged that he would receive some leniency because he had testified against Garcia.

At Garcia's direction Pacheco hid in the backseat of the car while Eva P. and Garcia negotiated. Pacheco was holding Garcia's knife because Garcia told him to point it at the person who got in the car. Garcia drove off once Eva P. was in the car; Pacheco pointed the knife at her neck and told her not to move. Eva P. reacted with fear. They drove off, telling Eva P. to put her head down so that she could not see where they were taking her. They took Eva P. to Pacheco's house and walked her inside to his room, keeping her between them so that she could not run away.

Pacheco believed that he had consumed so much alcohol that he blacked out during the night. He recalled Garcia and Eva P. going into the bathroom for 20 to 30 minutes when they first arrived at his home, during which time he sat and waited, drinking beer and smoking marijuana. Eva P. came out of the bathroom alone.

Eva P. looked different when she came out of the bathroom than she had when she went in. She was naked and crying, and Pacheco could see from her facial expression and her eyes that she was scared. She asked Pacheco what he wanted her to do for him, and he told her to perform oral sex on him. She attempted to do so for approximately 15 to 20 minutes while Garcia remained in the bathroom, but Pacheco was unable to maintain an erection. When Garcia exited the bathroom, he directed Eva P. to stop. He and Pacheco then smoked some methamphetamine. Eva P. was crying.

After the men smoked the methamphetamine, Pacheco "asked" Eva P. to orally copulate him again. While she did so, Garcia penetrated Eva P. from behind. This lasted approximately 30 minutes. Garcia then stopped; Pacheco believed that he was smoking more methamphetamine.

While Garcia was occupied, Pacheco testified that he asked Eva P. for sex and tried to place his penis in her vagina, but again he could not maintain an erection.

After this event, Garcia and Eva P. went into the bathroom again. Eva P. emerged wearing clothes. Pacheco could tell from her facial expression that she was still scared. They let her go around 4:00 a.m. Pacheco estimated that they had held Eva P. for five to six hours.

Pacheco later felt "bad because that was wrong," but Garcia told him that there was nothing wrong and only they would know what happened. Pacheco felt bad about what they did "because [they] forced her to do something that she didn't want," and they had forced her into sexual contact.

In a hearing outside the presence of the jury, the court addressed the admissibility of a recorded phone call between Garcia and his mother while Garcia was in custody. The conversation was lengthy—the transcript spanned 43 pages—and the prosecutor requested that the portion of the call corresponding to five of the transcript pages be admitted into evidence. Defense counsel requested that the entire call be admitted so that the portions that the prosecution wished to use would be placed in context. The trial court concluded that the entire recording need not be played because it contained irrelevant and inadmissible content. Because the portion of the call that the prosecution wished to use was not being taken out of context and was not a confession, and the remaining parts of the recording were not relevant or admissible, the court denied Garcia's request to introduce the entire call. Garcia also objected to the introduction of the selections as more prejudicial than probative under Evidence Code section 352, and the court overruled his objection. The court ruled that the portion of the recording that corresponded with two pages in the transcript could be played for the jury.

The portion of the recording played for the jury consisted of Garcia's mother making various statements, punctuated by brief expressions of agreement by Garcia:

Garcia's mother: "Like your Mommy says, those who killed somebody; but you haven't killed anybody . . ."

Garcia: "I know."

Garcia's mother: " . . . nor have you raped a little girl, or a little boy."

Garcia: "I know."

Garcia's mother: "They're streetwalkers, they are those who walk the streets, they're bad. You know what I mean?"

Garcia: "Yes, Mom."

Garcia's mother: "Yes. And that's why I back you up. Because you—I know, a little girl or something would be wrong, but they are prostitutes."

Garcia: "Yeah, I know."

Garcia's mother: "They are doing mischief [unintelligible] they're not worried about you. They would kill you or leave you there, and that's it."

Garcia: "Yeah, leave me for dead and that's it, done."

Garcia's mother then discussed religious matters, including advising Garcia that he should tell God, "Lord, forgive me. We all make mistakes, and I want to go on, I'm moving forward." Garcia continued to say "yeah" and "I know" to his mother's comments.

Michelle M. testified that in 2011 Garcia approached her in his car while she was working as a prostitute on a street corner in South Central Los Angeles. After they agreed on a price for vaginal intercourse with a condom, she entered his car. Garcia drove for some time and then pulled out a knife. Michelle M. fought back and he slashed her arm. Garcia raped her at knifepoint, refusing to use a condom. After ejaculating inside of Michelle M., Garcia let her go. Michelle M. went to the hospital and spoke with the police. Later, she orally identified Garcia as the rapist from a photographic lineup, although she refused to write her identification down for the police. DNA from the vaginal sample taken from Michelle M. matched Garcia, as did DNA swabbed from one of Michelle M.'s breasts.

V.B. testified that in 2012 she was working as a prostitute in South Central Los Angeles when Garcia approached her. They agreed that he would pay her for sex, she entered his car, and he drove to another location. Then Garcia pulled out a knife, held it to her neck, and told her he was not going to pay her. He also said that he had a gun and that he would shoot her if she "tr[ied] anything." V.B. told Garcia that she was menstruating, and he placed his fingers inside her vagina to ascertain whether that was accurate. He then placed his penis in her vagina without a condom and ejaculated inside her. Although V.B. had engaged in intercourse with other men on the day of the rape, her assailant was the only one who had not used a condom. Garcia released her after raping

her. She immediately flagged down passing police officers and told them that she had been raped. Based on her description of her assailant, the officers took her to look at an individual, whom she identified as the rapist.

V.B. went to the hospital, where a sexual assault examination and evidence collection was performed. DNA testing of the swabs used in the sexual assault examination of V.B. established that the man she had initially identified as the assailant was not the source of the sperm found inside and outside her vagina. The DNA matched Garcia's DNA.

Garcia did not testify, but his testimony from the first trial was read into the record. Garcia described himself as a longtime regular solicitor of prostitutes. He testified that he had sexual intercourse with Michelle M. for money but said that she tried to rob him. He admitted that it was possible that he had sex with V.B., but that he did not remember or recognize her. Garcia testified that Eva P. was a prostitute he had solicited. He claimed that Eva P. willingly went with him and Pacheco, quoting a price of "$100 for everything." He admitted that the three of them had gone to Pacheco's house. According to Garcia, he did not force her into the bedroom or hold her at knifepoint when they entered the home. He described the three having a sexual encounter lasting a few hours in which she and Pacheco had sex but neither one of them forced her to orally copulate him. Garcia denied forcing Eva P. to have intercourse with him. He placed his penis in her vagina while she was on her hands and knees and while she was on her back. He also engaged in anal intercourse with her and ejaculated while penetrating her anally. Garcia used a condom at some points, but not all, in his encounter with Eva P. He denied that either he or Pacheco displayed a knife or claimed to have a gun. Garcia said that after they were done, he paid Eva P. and gave her a ride to a Metro station.

In closing argument, the prosecutor addressed the recorded phone call between Garcia and his mother. He argued that the first "psychological thing[]" that people do when they, or their children, are caught doing something wrong is to minimize the severity of the behavior. This, he contended, was what occurred in the first portion of the recorded phone call: "[T]his is the defendant's mother discussing with him the

allegations in this case. And the implication is, 'You haven't raped'—she specifically says, 'You haven't raped but a little girl or a little boy. That would be bad. Those people who do that, and rape little girls and little boys, those people are bad.' [¶] And the defendant agrees. He says, 'Yeah, I know.'"

"What is the second thing that people do when they're caught doing something bad, when they're caught doing something wrong?" continued the prosecutor. "Blame the victim." The prosecutor called Garcia an experienced rapist who selected victims marginalized from society in the hope that if they reported the crime they would not be believed. He then returned to Garcia's phone call with his mother: "What is said here, 'They're street walkers. Those are those who walk the streets. They're bad. They're horrible people. It doesn't matter what you do to them. They're horrible people. They're prostitutes.' [¶] So that is the second thing. That is what is going through the defendant's mind. He says, 'I know. Yeah, Mom, yes.' 'They're horrible people. You do to them whatever you want.' And then finally after we've laid out our reasons why she supports him, she says, 'A little girl would be wrong. But that's why I back you up. Because what you have done isn't that bad. It's not killing somebody. It's not raping a small child. And they're bad anyhow. Those victims are bad anyhow.' [¶] And the defendant says, 'Yes, I know," agreeing with this line of reasoning. So this is the way he thinks."

Garcia was convicted as charged, with all special allegations found true. The court sentenced Garcia to the upper term of 9 years on count 2, stayed, and to 25 years to life pursuant to section 667.61, subdivisions (a) and (d). The court imposed and stayed a 15-year sentence for the section 667.61, subdivision (e) allegation that was found true by the jury, as well as a five-year sentence enhancement pursuant to section 12022.3, subdivision (b). The court imposed similar sentences on counts 3, 4, and 5, to be served concurrently with the sentence on count 2, and it stayed the sentence on count 1 pursuant to section 654. Garcia appeals.

DISCUSSION

I. Admission of Uncharged Acts

"When a defendant is accused of a sex offense, Evidence Code section 1108 permits the court to admit evidence of the defendant's commission of other sex offenses, thus allowing the jury to learn of the defendant's possible disposition to commit sex crimes." (*People v. Cordova* (2015) 62 Cal.4th 104, 132.) While acknowledging that this court is bound by *People v. Falsetta* (1999) 21 Cal.4th 903, 917-918 and *Auto-Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 to reject his argument, Garcia argues that Evidence Code section 1108 on its face violates due process. He also contends that the trial court abused its discretion in admitting evidence of the rapes of Michelle M. and V.B. because the evidence was more prejudicial than probative. He argues that once Michelle M. and V.B. testified, it was impossible for him to get a fair trial; that those two incidents did not involve an accusation of kidnapping; that while DNA linked him to these witnesses, DNA did not prove that they were raped, as they were both prostitutes; and that once the jury heard the other women's testimony it would necessarily believe the kidnapping allegation.

We review the trial court's ruling under Evidence Code section 352 for an abuse of discretion (*People v. Valdez* (2004) 32 Cal.4th 73, 108) and find none. The prior uncharged acts demonstrated Garcia's propensity to commit sexually violent acts with a weapon upon women he encountered on the street, and as such were highly probative. The uncharged acts were not unduly prejudicial because they were less extreme than the conduct alleged in this case, which involved transporting the victim, holding her against her will, and committing repeated violent sexual assaults over a period of several hours. We cannot say that the probative value of this evidence was substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

II. Exclusion of Portions of Recorded Telephone Call

Garcia objected to the prosecutor playing portions of his telephone call with his mother unless the entire recording was played for the jury, relying on Evidence Code sections 356 and 352. The trial court permitted the prosecutor to play a small part of the recording as an adoptive admission. On appeal, Garcia argues that the rule of completeness embodied in Evidence Code section 356 required the court to admit the entire conversation. He argues that if the prosecutor could use the conversation to show that Garcia had agreed to his mother's characterizations of his conduct, the jury should also have heard that Garcia also agreed with her statements that he had not committed rape and that he simply agreed with everything his mother said. "The purpose of Evidence Code section 356 is to avoid creating a misleading impression." (*People v. Samuels* (2005) 36 Cal.4th 96, 130.) Therefore, when a detached conversation is given in evidence, any other conversation "which is necessary to make it understood may also be given in evidence." (Evid. Code, § 356.) The rule applies "only to statements that have some bearing upon, or connection with, the portion of the conversation originally introduced"; statements pertaining to other matters may be excluded. (*Samuels*, at p. 130.)

While the question is a close one, we need not resolve it because any error in the admission of the recorded conversation without playing the other portions of the recording in which Garcia obediently agreed with all his mother's statements was harmless in light of the overwhelming evidence that Garcia committed the charged offenses. Both Eva P. and Pacheco testified to Garcia's crimes, Garcia's DNA was found inside Eva P.'s vagina, and there was evidence that Garcia had violently raped other women under similar circumstances in the past. Given this evidence against Garcia, any error was harmless under any standard of review.[3]

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[3] Garcia contends that the error deprived him of due process and is therefore evaluated under the harmlessness standard of *Chapman v. California* (1967) 386 U.S. 18,

III. Prosecutorial Misconduct

Garcia alleges prosecutorial misconduct during closing argument. Garcia's attorney argued that the full telephone call between Garcia and his mother was 30 minutes long and that the jury had heard only a few minutes of conversation "taken completely out of context." On rebuttal, the prosecutor responded to this argument, asking the jury to "ask[] yourself if that's true, if it is taken out of context and if the rest of the call is relevant to this case, if it's admissible evidence and it was taken out of context, don't you think that [defense counsel] would have played the rest of it for you?"

Defense counsel objected and requested a sidebar conference, but the court refused. After the prosecutor finished his argument, the court advised the jury what the jury heard was the portion of the recording that the court deemed relevant and admissible and that the jurors were not to guess or wonder why they did not hear more of the recording. The court continued, "Does everyone understand that? I read the entire transcript and I deemed that that was the only relevant and admissible evidence off of the entire phone call."

Subsequently, Garcia requested a mistrial. His attorney argued that the prosecutor's statements misled the jury to believe that Garcia could have played the entire call when in fact the defense had sought to play the full call but was not permitted to do so. She contended that while the court had intended to cure the problem with its closing instruction, instead it had unintentionally reinforced the prosecutor's argument.

The trial court concluded that the prosecutor had not committed misconduct because he stated that if there had been relevant and admissible evidence in the rest of the recording, the defense would have played it, and this was true—the court had "made the ruling that that was the only thing that I found to be admissible and relevant . . . ." The court continued, "So I wanted the jurors to know that I made the call, that what was relevant and admissible and they heard, after I reviewed the entire transcript, like I told

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while the Attorney General argues that the lesser standard of *People v. Watson* (1956) 46 Cal.2d 818, 856 applies.

them, what I deemed to be relevant and admissible, and they're not to speculate. [¶] Because I told them that, I believe any inadvertence by the People to misstate what you argued or what your intentions or preference was regarding the recording has been cured. Based on that reason, I will not grant a mistrial."

Garcia argues that the court should have granted a mistrial. A court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged. (*People v. Avila* (2006) 38 Cal.4th 491, 573.) "'Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' [Citation.] Accordingly, we review a trial court's ruling on a motion for mistrial for abuse of discretion." (*Ibid*.)

Although the prosecutor's comments were improper, we agree with the trial court that a mistrial was not required. While Garcia argues extensively that the prosecutor's actions amounted to misconduct, with respect to prejudice he argues only that the recorded call was alleged to be a confession, but that when Garcia's words were placed in their proper context, there was no confession. As "a confession is the most damaging evidence against a defendant," he argues that "[w]ithout a confession it is reasonably probable that the jury would not have believed the testimony" of Eva P. or Pacheco, and that reversal is therefore required under the standard of *Chapman v. California*, *supra*, 386 U.S. 18. Garcia, however, has not identified any instance in the record in which the recorded call was alleged to be a confession. The prosecutor argued in closing argument that the recording demonstrated his mother's minimization of the crime and placing of blame on the victim, and that Garcia's responses showed that he "agree[d] with this line of reasoning. So this is the way he thinks." Garcia's attorney contended in her closing argument that the prosecutor was trying to convince the jury that his comments constituted a confession, but Garcia has not shown on appeal that the prosecutor made any such representation. Garcia, therefore, has not demonstrated that the alleged misconduct was incurably prejudicial or that the court abused its discretion in denying his mistrial motion.

IV. Cumulative Error

We reject Garcia's final contention that the cumulative effect of the claimed errors deprived him of due process of law and a fair trial. Any errors here were harmless under the circumstances presented by this case, and they do not combine to create reversible cumulative error.

V. Sentencing

Four of the five offenses of which Garcia was convicted fell within the scope of the One Strike law, section 667.61. "The purpose of the One Strike law is 'to ensure serious and dangerous sex offenders would receive lengthy prison sentences upon their first conviction,' 'where the nature or method of the sex offense "place[d] the victim in a position of elevated vulnerability."'" (*People v Alvarado* (2001) 87 Cal.App.4th 178, 186, italics omitted.) It "'sets forth an alternative and harsher sentencing scheme for certain enumerated sex crimes' when a defendant commits one of those crimes under specified circumstances. [Citations.]" (*People v. Acosta* (2002) 29 Cal.4th 105, 118.)

Section 667.61, subdivision (a) provides that except in circumstances not applicable here, "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." If the defendant is convicted of one of the specified offenses under only one of the circumstances specified in section 667.61, subdivision (e), then the defendant is to be sentenced to a prison term of 15 years to life. (§ 667.61, subd. (b).)

Garcia was convicted in counts 2 through 5 of four offenses specified in section 667.61, subdivision (c): forcible oral copulation in concert; forcible rape by a foreign object, acting in concert; forcible rape in concert; and forcible sodomy in concert. For each of these counts, the jury found true two circumstances pursuant to section 667.61, one under subdivision (d) and the other under subdivision (e). Specifically, the jury found true the allegation that Garcia had kidnapped Eva P. within the meaning of section

667.61, subdivision (e); and the allegation that he kidnapped Eva P. and that the movement of the victim moving substantially increased the risk of harm to her over and above that necessarily inherent in the underlying offenses, within the meaning of section 667.61, subdivision (d).

Because the jury found true a circumstance under section 667.61, subdivision (d) for these offenses, section 667.61, subdivision (a) mandated that the trial court sentence Garcia to terms of 25 years to life for each of counts 2 through 5.[4] (§ 667.61, subd. (a).) (*People v. Rodriguez* (2012) 207 Cal.App.4th 204, 213-214 [One Strike law requires the imposition of a 25-year-to-life sentence on each eligible offense].) The sentence Garcia received was not in full compliance with this highly technical alternative sentencing scheme, as the trial court treated the One Strike Law as providing for something akin to a separate criminal offense or sentence enhancement within the determinate sentencing system. Selecting count 2 as the principal count, the court imposed a determinate high term of nine years and then a enhancement of 25 years to life for the "conviction" under the One Strike law, section 667.61, subdivision (a). Then, the court sentenced Garcia to 15 years in state prison under the One Strike law because Garcia had been "convicted of a violation of section 667.61, subdivision[s] (a) [and] (e)," a sentence for which there is no provision in section 667.61.[5] The court stayed the original principal term, the additional One Strike 15-year sentence, and a five-year sentence enhancement for use of a deadly weapon under section 12202.3, subdivision (b). The court repeated this pattern for the other three One Strike offenses.

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[4] The sentence on count 1 for aggravated kidnapping was properly stayed under section 654. (§ 209, subd. (d).)

[5] Where both subdivisions (a) and (b) are satisfied by the jury's findings, as here, the defendant is sentenced under 667.61, subdivision (a) rather than subdivision (b). (§ 667.61, subds. (b), (f).) Any additional aggravating circumstances pleaded and proven beyond the minimum required for the punishment provided in the One Strike law "shall be used to impose any punishment or enhancement authorized under any other provision of law." (§ 667.61, subd. (f).) Finally, even if sentencing under section 667.61, subdivision (b) were appropriate here, that provision authorizes a term of 15 years to life in state prison, not a determinate term of 15 years. (§ 667.61, subd (b).)

The parties agree that this was error, but they disagree whether the error requires resentencing. Garcia argues that although the court erred at sentencing, he nonetheless received the 25 years to life required by the One Strike law, and thus a remand for resentencing is unnecessary. The Attorney General contends that resentencing is necessary because of this error and because the trial court failed to impose consecutive sentences on the One Strike offenses in contravention of applicable law.[6]

Section 667.61, subdivision (i) requires the trial court to "impose a consecutive sentence for each offense" falling under the One Strike law if the crimes involved separate victims or the same victim on separate occasions. (§ 667.61, subd. (i).) To decide whether a crime was committed against a single victim on separate occasions, a court is to "consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions." (§§ 667.6, subd. (d); 667.61, subd. (i).)

"Once a trial judge has found under section 667.6, subdivision (d), that a defendant committed offenses on separate occasions, we may reverse only if no reasonable trier of fact could have decided the defendant had a reasonable opportunity for

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6 The Attorney General argues in supplemental briefing that consecutive sentences were mandatory here under section 667.61, subdivision (i) and section 667.6, subdivision (d). Relying on the sentence as set forth in the abstract of judgment, which describes the One Strike sentences on counts 3 through 5 as stayed, the Attorney General contends that it was error to stay the sentences under section 654 when consecutive sentences were legally required. The abstract of judgment diverges substantially and materially from the sentence imposed at the sentencing hearing, as the reporter's transcript from the sentencing reflects that the court did not stay the One Strike sentences on those three counts but instead ran them concurrently. Where there is a discrepancy between the court's oral pronouncement and the minute order or abstract of judgment, the oral pronouncement controls. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.) The People's contention that consecutive sentences were mandatory, however, is independent of the question of whether a section 654 stay was authorized by law, and we therefore address it in the context of the sentence orally imposed by the court.

reflection after completing an offense before resuming his assaultive behavior." (*People v. Garza* (2003) 107 Cal.App.4th 1081, 1092.) Here, however, the trial court never found that Garcia committed the offenses on separate occasions. Instead, the court focused on the fact that there was only one victim and that the sexual offenses took place at one location, and it appeared to believe that the law required concurrent sentences under those circumstances. The court said that its "reading of the law is that it was one victim. They did not file, as I indicated, multiple victims. They filed it as one victim. The kidnapping occurred. You took her to one location, which was a residence. All of the sexual acts by you and your co-defendant occurred at that one location[,] in that one bedroom at the one location[,] over a period of hours before you released her. [¶] For that reason, you will be sentenced concurrently to 25 years to life." To the extent that the trial court believed that the law required concurrent sentencing because there was a single location and a single victim,[7] the court was incorrect. The fact that the crimes all took place in one location does not mean that they did not occur on separate occasions. (*People v. Plaza* (1995) 41 Cal.App.4th 377, 385 [sexual assaults occurred on separate occasions although all of the acts took place in the victim's apartment with no break in control over the victim].)

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[7] Although this cannot be determined with certainty from the court's statements, the incongruity between its statements to Garcia that he "should never, ever be released from prison, ever," and that it was "unfortunate" that the prosecutor had not charged Garcia with crimes against V.B. and Michelle M. so that his prison term could be extended, on the one hand; and on the other hand, the court's assertion that its understanding of the law was that he would be sentenced concurrently because there was one victim and one location, suggests that in addition to failing to make the required determination under section 667.6, subdivision (d), the court also may not have been aware that even if it had determined that the acts were considered to have been committed on the same occasion, it would nonetheless have retained discretion under section 669 to impose consecutive or concurrent sentences. (*People v. Rodriguez*, *supra*, 207 Cal.App.4th at p. 214.)

Because the court did not make the necessary determination concerning separate occasions, the matter must be remanded for resentencing.[8] For the guidance of the trial court on remand, we observe that it is a "virtually self-evident conclusion that discrete sexual assaults on the same victim occur on 'separate occasions' as that term is used in section 667.6, subdivision (d) when the assaults are personally committed by different persons even if one follows the other in rapid succession." (*People v. McPherson* (2001) 86 Cal.App.4th 527, 530 [concerning rapes in concert committed by two perpetrators].) As the *McPherson* court observed, when a person is waiting his turn to commit a sexual assault, it is "an understatement to conclude that" he had a reasonable opportunity to reflect upon his actions. (*Id*. at p. 531.) The other assailant's assault affords the perpetrator "a graphic opportunity to reflect on his further participation in these events." (*Ibid*.)

Given that both Eva P. and Pacheco testified to a series of sexual assaults taking place over the course of at least five to six hours that included taking turns assaulting her, movement between the bed and the bathroom, pleas for release, time when the other man was assaulting Eva P., incidents in which Garcia slapped and choked Eva P. while instructing her where to look, and interludes of methamphetamine smoking, as well as approximately seven anal or vaginal rapes while Garcia wore condoms, and five to seven more without condoms once Garcia had exhausted his supply of them, it is difficult to envision the trial court determining that Garcia had no opportunity to reflect before committing his sexually assaultive behavior. In the event that the trial court determines that the offenses were committed on a single occasion, however, it retains the discretion to determine whether the terms should be served consecutively or concurrently. (*People v. Rodriguez*, *supra*, 207 Cal.App.4th at p. 214 [court has discretion to impose consecutive or concurrent One Strike sentences on eligible offenses when it finds that all the sex offenses occurred on a single occasion against a single victim].)

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8 This determination makes it unnecessary to address the Attorney General's arguments on appeal concerning the section 12022.3, subdivision (b) enhancements; these may be presented at the new sentencing hearing.

DISPOSITION

The matter is remanded to the trial court for resentencing. The superior court is then directed to prepare a corrected abstract of judgment and to forward a certified copy of the abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.