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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. GINO DONTE BREWER, Defendant and Appellant.	B232351 (Los Angeles County Super. Ct. No. BA309601)

APPEAL from a judgment of the Superior Court of Los Angeles County. Judith L. Champagne, Judge. Affirmed as modified.

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Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, David C. Cook and Baine P. Kerr, Deputy Attorneys General, for Plaintiff and Respondent.

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Gino Donte Brewer appeals from the judgment entered after a jury convicted him of forcible rape, forcible oral copulation, sexual penetration by foreign object and kidnapping to commit another crime. Brewer contends the trial court committed prejudicial error by admitting evidence of prior sexual offenses under Evidence Code section 1108 and then precluding evidence that a jury in a trial regarding those offenses was unable to reach a verdict. We disagree and thus affirm the judgment.[1]

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Information*

A third amended information, dated March 1, 2011, charged Brewer with four counts: (1) forcible rape (Pen. Code, § 261, subd. (a)(2)); (2) forcible oral copulation (Pen. Code, § 288a, subd. (c)(2)); (3) sexual penetration by foreign object (Pen. Code, § 289, subd. (a)(1)(A)); and (4) kidnapping to commit another crime (Pen. Code, § 209, subd. (b)(1)). As to counts 1, 2 and 3, the information specially alleged that (1) Brewer had kidnapped the victim and her movement substantially increased the risk of harm to her over and above that level of risk necessarily inherent in the offense of rape (Pen. Code, § 667.61, subds. (a) & (d)(2)); (2) Brewer had a prior serious or violent felony conviction for burglary that qualified as a strike under the "Three Strikes" law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)); (3) the burglary conviction subjected Brewer to sentencing pursuant to Penal Code section 667, subdivision (a)(1);

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[1] This appeal is from the judgment following Brewer's second trial on the charges of forcible rape, forcible oral copulation, sexual penetration by foreign object and kidnapping to commit another crime. After the first trial, the jury found Brewer guilty on all four counts. On Brewer's appeal, we reversed the judgment on the ground of prejudicial evidentiary error. The erroneously admitted evidence consisted of expert testimony regarding child sexual abuse accommodation syndrome and rape trauma syndrome, testimony from a woman named C.C. who described a sexual attack on her but did not identify Brewer as the perpetrator and evidence that a jury in a trial against Brewer regarding the attack on C.C. did not reach a verdict but voted 10 to 2 in favor of guilt. In addition, in closing argument, the prosecutor presented facts outside the record identifying Brewer as C.C.'s attacker. (*People v. Brewer* (Dec. 8, 2009, B207859) [nonpub. opn.].)

and (4) Brewer had served one prior prison term within the meaning of Penal Code section 667.5, subdivision (b).[2]

2. *The Evidence Presented at Trial*

a. *The Incident Between Brewer and S.S. and Brewer's Arrest*

On September 5, 2006, about 3:45 p.m., when S.S. was 14 years old and walking home from her first or second day of high school, a black car pulled up near her. The driver, an African American man, identified as Brewer, called her over to the car. S.S. went to the car, and Brewer asked S.S. for her hand, kissed it and then recited a poem about a beautiful African queen. Because Brewer was blocking traffic, S.S. suggested that he drive his car around the corner, which he did. S.S. and Brewer continued to talk. S.S. told Brewer that she was 14 years old, and Brewer said that he was 27 years old. Brewer told S.S. that she was beautiful, he wanted to be with her and he would buy her clothes and take her to get her nails and hair done. S.S. was interested because she could not afford to buy the clothes that she wanted for high school and gave Brewer her cellular telephone number. Brewer asked S.S. if she wanted to get into the car so that they could drive around and talk, and S.S. agreed.

Once S.S. was in the car, Brewer asked her if she had a boyfriend, and she said it did not matter. Brewer also asked whether S.S. had had sex or oral sex, with a man or woman, and she responded that she had not, feeling uncomfortable. While driving, Brewer told S.S. to trust him and put S.S.'s hand on his lap near the zipper of his pants. S.S. snatched her hand away, and Brewer put her hand back on his crotch. He had an erection. He took out his penis, played with himself and then told S.S. to do it. S.S. complied, although she was scared and never before had touched a penis. S.S. told Brewer that she thought she should go, they "could do this another time" and he "'could call [her] another time.'" Brewer told S.S. not to be scared. He drove the car behind a

[2] The information also included a special allegation under Penal Code section 667.61, subdivisions (a) and (d)(2), as to count 4. At the People's request, the trial court dismissed that special allegation before the case went to the jury.

group of stores because he was running out of gas and asked S.S. if she wanted to come with him to buy more gas. S.S. declined because she did not want to be seen with Brewer, and he kissed her before leaving her in the car and electronically locking the doors. S.S. was "worried" and "kind of frightened," but did not try to exit the car, believing an alarm would sound if she unlocked and opened the door. She thought that she would tell Brewer to take her home when he returned to the car. When Brewer returned, he had a cup of gas but could not put it into the car's gas tank. He then drove to an auto parts store and left S.S. again in the locked car. After he came back to the car, Brewer drove a few blocks to a gas station and put gas in the car, leaving S.S. in the locked car.

As Brewer drove from the gas station, he told S.S. to pull down her pants, speaking in a "strong" and "scary" voice. S.S. questioned Brewer, and he told her to "'just do it'" and "stop talking" because he wanted to look at her vagina. Brewer spoke aggressively, and S.S. felt as though she "didn't have a choice." S.S. pulled down her pants and underwear toward her hips, and Brewer pulled them down to her knees. S.S. tried to cover her vagina with her shirt, but Brewer raised her shirt and told S.S. to say to him that she was his bitch and that it was his pussy. Brewer told S.S. to put her mouth around his penis, and, when she said no, he used his right hand to push her head into his lap. S.S. finally put her mouth around Brewer's penis, and he moved his body forward to force his penis deeper into her mouth. Brewer touched S.S.'s vagina and then put his finger in it, causing S.S. to feel a sharp, sudden pain. She asked Brewer to stop and told him two or three times that she wanted to go home. Brewer told S.S. not to lift her head up until he "said so." S.S. gagged, telling Brewer that she was going to vomit. Brewer pulled over and stopped driving, but left the engine running, and S.S. spat outside the car. Brewer would not let her pull up her pants. S.S. did not try to leave because she felt that she could not get out of the car fast enough and her pants were down.

Brewer then continued to drive and told S.S. they would go into the backseat so he could kiss her buttocks. S.S. climbed into the backseat while Brewer was driving. Brewer stopped the car at a park and got into the backseat. He took one of S.S.'s legs out

from her pants, kissed her buttocks and then turned her on her back, unzipping his pants. S.S. "got scared because [she] thought he was trying to put [his penis] inside of [her]. [She] started crying, and [Brewer] told [her] to be quiet" in a strong, demanding tone. Brewer rubbed his finger and then penis in S.S.'s vagina. S.S. "remember[ed] a lot of pressure. It hurt a lot. It felt like he was trying to put it inside. [She] started crying louder. [She] told him, 'No.' [She] didn't think he was going to do it. He had just got through saying he wasn't going to do anything because he didn't have a condom. [She] just kept crying. [She] tried to lift [her]self. [She] pushed her body toward[] the side of the car and tried to sit up. He asked [her] if he could come inside of [her]." S.S. said, "'Stop, that hurts. I thought you said you weren't going to put anything inside of me.'" S.S. then felt something wet on her leg and saw "white stuff" that had come from Brewer on the seat. At the time she did not know what the "white stuff" was or what it was called. Brewer let S.S. pull up her pants, and she helped him zip his pants or buckle his belt, thinking that, "if [she] would [act] nice[ly], he wouldn't ask [her] to do anything else."

Brewer and S.S. got back into the front seat, and Brewer began driving again, telling S.S. that they could be together and that he would buy her lingerie and heels and get her hair done so that she could work for him. S.S. thought Brewer was referring to prostitution. S.S. asked Brewer to drop her off close to, but not at, her house. He would not take her there because the area was crowded with people. He offered to drop her off at another location, and S.S. agreed, knowing that she had relatives who lived nearby. Brewer told her, "This is between you and [me]. You are not going to tell anyone, are you?" S.S. said she would not.

Once Brewer dropped off S.S., she ran to the house where her cousin lived with his fiancée. She was close to her cousin and his fiancée and often visited them and their twin children. When S.S. arrived at the house, she was crying, and her cousin and his fiancée could not understand what she was saying to them. After her cousin told her to breathe and slow down, S.S. said, "'I got into a man's car and something happened. Something bad happened.'" According to her cousin's fiancée, S.S. explained that she

had been raped. Her cousin and his fiancée said that she should make a police report, but S.S. was afraid because she had "told [Brewer] [she] wouldn't. [She] gave him [her] cell phone number. It just seemed like a risk."

S.S. nevertheless went to the police station and filed a report later that day. The police took her to a rape treatment center, where she gave the nurse an account of the incident with Brewer and the nurse conducted a physical examination, which showed blood at the base of the vaginal opening, an abrasion and tenderness on the hymen, indicating "some penetration beyond the labia[,] which is past the vaginal lips." The nurse reported the examination as being painful for S.S. S.S.'s injuries were consistent with a sexual assault, but the nurse could not determine whether they were caused by consensual or nonconsensual sexual activity. DNA collected from S.S. during the examination matched Brewer's DNA. The examination made S.S. feel "nasty and uncomfortable and embarrassed," and she cried during it.

A few days after S.S.'s encounter with Brewer, S.S.'s older sister came to visit her and took her and their little sister shopping for shoes at a store that was three blocks from home and close to where Brewer had met S.S. on the street. While in the store, S.S. saw Brewer outside, and he came into the store. S.S. was scared and ran to the back of the store, telling her older sister, "'It's him. It's him.'" S.S., while crying but trying to stay quiet, hid with her little sister. Her older sister went to the front of the store and saw Brewer ask an employee what time the store closed and then leave. S.S.'s older sister went into the parking lot to look for Brewer and called 911, stating, "'My sister was sexually assaulted and we see the guy.'" She also called her cousins and her mother. She then saw Brewer talking to another man and called 911 again. Brewer disappeared, and she approached the man to whom he had been talking and asked questions about Brewer. S.S.'s mother arrived. Brewer then appeared again, and S.S.'s older sister told their mother, "'Mama, that is him, that is him in the white shirt. That is him right there.'" The man to whom Brewer had been speaking said to Brewer, "'Hey, man, they say you raped their sister.'" Brewer responded, "'I didn't rape . . . no "f'in" body,'" and took off running. S.S.'s mother ran after him but was unable to catch him. The police arrived,

and S.S.'s older sister retrieved S.S. and their little sister from the store. When S.S. heard that her mother had chased Brewer she "freaked out" and said "'he is going to kill us.'"

On September 20, 2006, the police conducted a follow-up interview with S.S., during which she identified Brewer from a photographic lineup as the person who had sexually assaulted her. After Brewer was identified as a suspect in the assault, a warrant issued for his arrest. On October 19, 2006, the police set up surveillance outside a residence where they believed they might find Brewer. After waiting for 50 or 55 minutes, they saw a man matching Brewer's description exit the residence. Officers approached Brewer and identified themselves. Brewer looked around and then ran back into the residence and into the backyard. He leaped over a four-foot fence and ran alongside the houses on the street. He stopped abruptly when he saw an officer in front of him, slipped and fell and "eventually gave up." The police arrested him.

b. *The Evidence of Prior Sexual Offenses Under Evidence Code Section 1108*

M.K. testified that on July 13, 1997 she lived in an apartment in Santa Monica and about 8:45 p.m. that evening she was lying on her bed watching television. Although the front door was open, the screen door was locked. M.K. looked up and saw a man, whom she identified at trial as Brewer, standing above her bed. Brewer "[a]lmost immediately . . . jumped on top of [her], pinning [her] down, and [they] started tussling." Brewer tried to take off her top. M.K. started to scream, and Brewer told her "'just shut up.'" As a result of the struggle, M.K. became wedged between the bed and the wall, causing a wooden rod with drapes to crash down on her and the bed. Brewer choked her and put his fist in her mouth to stop her from screaming. He had "[s]ome kind of fabric" covering his hand, and M.K. "bit down as hard as [she] could." Brewer took his fist out of her mouth and stood up from the bed. M.K. stood up as well, becoming face-to-face with Brewer in the doorway next to the bed. She remembered he appeared very young and had almond-shaped eyes and prominent lips. As Brewer left the apartment, he grabbed M.K.'s purse. M.K. called the police, who arrived soon thereafter. As a result of the attack, M.K. sustained a black eye, a bloody mouth and various scratches on her torso and had shooting pains and spasms in her neck for about three

weeks. After viewing several photographic lineups, M.K. circled Brewer's picture in one of the lineups, stating, "'Looks close. Same [complexion], facial features, lips, nose and eyes, shape of face.'" On October 20, 1998, she participated in a live lineup in which she identified Brewer and wrote, "'Looked somewhat like my attacker. He had the right physique. At the time, no facial hair and was wearing a hat.'" At trial, M.K. testified on cross-examination, "When I see you there, I can say with absolute certainty, yes, you are the man because I was this close to you face-to-face, and I am close enough and looking at you, and I can see the movements and your impression, and I know this is the person. You are the person who attacked me in my bed."

C.C. lived in an apartment in Venice on August 6, 1997, and about 8:30 p.m. that evening left the apartment with the door unlocked to take out the trash. When she returned, she lay down on her stomach on the floor in the living room to spread out materials that she was working with that evening. She heard a slight noise behind her and felt someone jump on top of her and a tie coming around her face. She put her hands up to block the tie from going around her neck and a male voice from behind her said, "Don't move, be quiet." She thought, "If I am not quiet, he is going to kill me. I need to give him what he wants and do what he wants, and he will leave me alone." The man worked his hand underneath her clothing, grasping at and touching her breasts and trying to pull down her shorts. C.C. tried to keep her shorts up, shouted at the man and attempted to stop him from tightening the tie around her neck, but it became tighter and she felt a "little dizzy . . . ." She saw that the man was African American, with dark skin and dark eyes, and tried to poke him in the eye. C.C. continued to struggle with the man. He said that he had a knife, but she did not believe him. The man took the side of her head and hit it into the coffee table. The struggle continued, and they knocked into the entertainment center. C.C. picked up a drum next to the entertainment center and threw it against the wall, hoping a neighbor would hear her. The man told her no one would come and put his hands inside her mouth. C.C. noticed his hands were covered in white, athletic socks and bit down on his hands. C.C. could not struggle anymore and stopped. The man "raised up a little bit" and pressed against her. C.C. could tell that he

had an erection. The man's hands went toward her buttocks, away from her throat, and he half-bit, half-kissed her cheek and told her "to be quiet, it would be okay, let him do what he wanted to." C.C. pushed herself up off the floor and looked out the patio doors in front of her and saw her building manager, Wynette Weller, standing outside. C.C. screamed to Weller to help her. Weller ran toward C.C.'s apartment, and the man lifted off of C.C. He left the apartment, taking a $10 bill on his way out, and exchanged words with Weller as he passed her. As a result of the attack, C.C. suffered a large bump on her head, abrasions on her face, fabric burns on her cheeks, chin and neck, carpet burns on her face, elbows and knees and bruises on her neck, back, arms and ribs. C.C. was unable to identify her assailant.

Weller testified that on the night of August 6, 1997 she heard a strange noise, "something muffled," "just different" and "loud," and walked out of her apartment. She heard another noise, "like a muffled noise or a banging noise," and then heard C.C. say "'help me.'" She could see into C.C.'s apartment and "could tell there was a struggle going on." Weller walked to C.C.'s apartment, and the front door opened. An African American male, whom Weller identified as Brewer, walked out of the apartment right in front of Weller, probably a foot from her. Brewer said to Weller, "'You better go help her.'" C.C.'s face was bloody, and she was crying. Weller called 911, and C.C. spoke on the telephone to the operator as well. Weller was unable to identify the assailant from a photographic lineup, but, at a live lineup on October 20, 1998, she "immediate[ly]" identified Brewer as C.C.'s attacker. At trial, Weller was 99 percent certain that the man who had attacked C.C. was Brewer.

c. *Brewer's Argument to the Jury*

Brewer, who voluntarily had waived his right to counsel and represented himself at this trial, presented no evidence in defense but argued in closing remarks to the jury that the People had not proved beyond a reasonable doubt that S.S. did not consent to the sexual acts between them.

3. *The Jury's Verdict and Sentencing*

The jury found Brewer guilty of forcible rape, forcible oral copulation, sexual penetration by foreign object and kidnapping to commit rape and found true the special allegation that Brewer had kidnapped the victim and the movement of the victim substantially increased the risk of harm to her over and above that level of risk necessarily inherent in the underlying offense within the meaning of Penal Code section 667.61, subdivisions (a) and (d)(2). In a bifurcated proceeding, the trial court told the jury that it had determined that Brewer was the person identified in the People's prior-conviction package, and the jury found true the special allegations that (1) Brewer had a prior burglary conviction that qualified as a strike under the Three Strikes law; (2) the prior burglary conviction subjected Brewer to sentencing under Penal Code section 667, subdivision (a)(1); and (3) Brewer had served a prior prison term within the meaning of Penal Code section 667.5, subdivision (b).

The trial court sentenced Brewer on count 1 for forcible rape to a state prison term of 55 years to life, consisting of 25 years to life based on the finding under Penal Code section 667.61, subdivisions (a) and (d)(2), doubled pursuant to the Three Strikes law, plus five years for the prior serious felony conviction within the meaning of Penal Code section 667, subdivision (a)(1). As to count 2 for forcible oral copulation and count 3 for sexual penetration by foreign object, the court imposed concurrent terms of 16 years per count, consisting of the upper term of eight years doubled pursuant to the Three Strikes law. On count 4 for kidnapping to commit another crime, the court imposed a life term but stayed execution of sentence pursuant to Penal Code section 654 because Brewer already had been punished for the kidnapping based on the enhancement under Penal Code section 667.61, subdivisions (a) and (d)(2), as to count 1. The court struck the punishment for the one-year, prior-prison-term enhancement pursuant to Penal Code section 667.5, subdivision (b).

DISCUSSION

1. *The Trial Court Did Not Commit Prejudicial Error By Admitting Evidence of Prior Sexual Offenses Under Evidence Code Section 1108*

Brewer contends the trial court committed prejudicial error by admitting the evidence under Evidence Code section 1108 of the prior sexual offenses against M.K. and C.C. He also contends that, given admission of the evidence, the court also should have permitted evidence that a jury in a trial regarding charges based on those offenses was unable to reach a verdict. We disagree with both contentions.[3]

Evidence Code section 1108, subdivision (a), provides, "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101[, prohibiting evidence of a defendant's character, or a trait of his character, to prove conduct on a specified occasion], if the evidence is not inadmissible pursuant to Section 352." As explained by the Supreme Court, Evidence Code section 1108 "allows evidence of the defendant's uncharged sex crimes to be introduced in a sex offense prosecution to demonstrate the defendant's disposition to commit such crimes." (*People v. Reliford* (2003) 29 Cal.4th 1007, 1009.) Under the provision, trial courts may not "deem such evidence unduly prejudicial per se, but must instead engage in a careful weighing process under Evidence Code section 352." (*Id*. at pp. 1012-1013.)

"In exercising this discretion [under Evidence Code section 352] as to a sexual offense, 'trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offenses, and the availability of less prejudicial

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[3] Brewer also asks us to revisit the constitutionality of Evidence Code section 1108. The Supreme Court rejected constitutional challenges to the statute in *People v. Loy* (2011) 52 Cal.4th 46, *People v. Lewis* (2009) 46 Cal.4th 1255 and *People v. Falsetta* (1999) 21 Cal.4th 903. We are bound to follow those decisions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense.' [Citation.] The court's ruling under section 1108 is subject to review for abuse of discretion. [Citation.]" (*People v. Loy*, *supra*, 52 Cal.4th at p. 61.) """'[E]vidence offered under [section] 1108 [sh]ould not be excluded on the basis of [section] 352 unless "the probability that its admission will . . . create substantial danger of undue prejudice" . . . substantially outweigh[s] its probative value concerning the defendant's disposition to commit the sexual offense or offenses with which he is charged and other matters relevant to the determination of the charge. As with other forms of relevant evidence that are not subject to any exclusionary principle, *the presumption will be in favor of admission*.'" [Citation.]' [Citation.]" (*Id.* at p. 62.)

The trial court did not abuse its discretion by admitting evidence regarding the prior sexual offenses against M.K. and C.C. Given Brewer's argument to the jury, the issue at trial was whether S.S. had consented to the sexual acts with Brewer, rendering an assessment of her credibility essential to the jury's determinations. Part of the Legislature's rationale in enacting Evidence Code section 1108 was that evidence of prior sexual offenses is relevant because sexual offenses often are committed in secret with no corroborating evidence and "frequently 'result in trials that are largely credibility contests.' [Citation.]" (*People v. Manning* (2008) 165 Cal.App.4th 870, 878, citing *People v. Falsetta*, *supra*, 21 Cal.4th at pp. 915, 918.) Admission of the evidence regarding the prior sexual offenses thus was in line with a statutory purpose. Moreover, although the incident between Brewer and S.S. and the offenses against M.K. and C.C. were not similar in all respects, they each involved force as a means to accomplish sexual acts against vulnerable victims who were unfamiliar with the perpetrator and attempts to convince the victims not to resist. Evidence linked Brewer to the prior offenses against M.K. and C.C., and no dispute existed at trial that Brewer had engaged in the sexual acts testified to by S.S. S.S.'s account of the incident at trial was corroborated by what she had told her older sister and her cousin and his fiancée and consistent with the physical examination of her. The incident between Brewer and S.S. occurred nine years after the

offenses against M.K. and C.C., and the prior sexual offenses, therefore, were not too remote in time, particularly given that Brewer was in prison for a number of the intervening years. The evidence of the prior sexual offenses was presented with only four witnesses, who had no connection to S.S. or her incident with Brewer, and did not consume undue time in the trial against Brewer.[4]

Nor did the trial court err by declining to admit evidence that the jury in the cases involving M.K. and C.C. did not reach a verdict. In introducing evidence of a prior sexual offense under Evidence Code section 1108, evidence that the defendant was acquitted of charges regarding the prior sexual offense must be admitted. (*People v. Griffin* (1967) 66 Cal.2d 459, 465-466; *People v. Mullens* (2004) 119 Cal.App.4th 648, 669.) Brewer, however, cites no authority, and we are aware of none, holding that evidence that a jury was unable to reach a verdict regarding the prior sexual offense must be admitted. Indeed, such evidence would allow jurors to use the current charges to punish the defendant for the prior sexual offense if it believed that he had committed it.

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[4] The trial court properly instructed the jury under CALCRIM No. 1191 on the preponderance-of-the-evidence standard of proof necessary for the prior sexual offenses and the limitations on use of the evidence: "The People presented evidence that the defendant committed the crime of assault with intent to commit rape[,] which was not charged in this case. This crime is defined for you in these instructions. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offenses. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit and did commit forcible rape, forcible oral copulation, sexual penetration by foreign object, and kidnapping to commit rape by force, as charged here. If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of forcible rape, forcible oral copulation, sexual penetration by foreign object, and kidnapping to commit rape. The People must still prove each charge and allegation beyond a reasonable doubt."

2. *The Judgment Must Be Modified to Reflect a Penal Code Section 667, Subdivision (a)(1), Enhancement on Counts 2 and 3*

As the People noted in their respondent's brief, and Brewer did not contest in reply, the trial court was required but failed to impose a five-year enhancement under Penal Code section 667, subdivision (a)(1), on Brewer's sentence in each of counts 2 and 3 based on the jury's true finding that he had a prior serious felony conviction for burglary. (*People v. Purata* (1996) 42 Cal.App.4th 489, 498 ["Where a person has been convicted of a serious felony in the current case, and it has been alleged and proved the person suffered a prior serious felony conviction within the meaning of section 667, subdivision (a)(1), the trial court must impose a consecutive five-year term for each such prior conviction" and "has no discretion"; "the sentence is mandatory"]; see *People v. Williams* (2004) 34 Cal.4th 397, 402-404.) Accordingly, we modify the judgment to reflect that the sentences on each of counts 2 and 3 consist of the upper term of eight years, doubled pursuant to the Three Strikes law, plus five years under Penal Code section 667, subdivision (a)(1), both to run concurrently with the sentence imposed on count 1. (*Purata*, at pp. 498-499 [reviewing court may correct "sentences beyond the jurisdiction of the trial court," such as the failure to impose a five-year term pursuant to Pen. Code, § 667, subd. (a)(1), at "any time when brought to the court's attention either by the People's appeal, by the Attorney General in response to the defendant's appeal, or by the Department of Corrections"].)[5]

[5] The People also contend a five-year enhancement under Penal Code section 667, subdivision (a)(1), should have been imposed as to count 4. The enhancement, however, was charged as to counts 1, 2 and 3, not as to count 4, and thus is proper as to counts 1, 2 and 3 only.

DISPOSITION

The judgment is modified to reflect that the concurrent sentences imposed on each of counts 2 and 3 consist of the upper term of eight years, doubled pursuant to the Three Strikes law, plus five years under Penal Code section 667, subdivision (a)(1). As modified, the judgment is affirmed. The trial court is directed to send a corrected abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.